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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

ELI TARBELL, ANTHONY LAUGHING, and PETER BURNS, SR.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(S4756—LC2-944)

QUESTIONS PRESENTED

1. Whether the Federal Government has jurisdiction to prosecute St. Regis Mohawk Indians for conduct occurring on the St. Regis Reservation in New York State: (1) in view of Title 18 U.S.C. §232 which this Court and other Courts have stated is a surrender, or cession of jurisdiction by the Federal Government to the State of New York?, or (2) in view of the fact that the area in question is not Indian Country within Title 18 U.S.C. §1151?

2. Whether the Indian Gaming Regulatory Act (Title 25 U.S.C. Chapter 29) pre-empts prosecutions of Title 18 U.S.C. §1955(a) and, if it does not, whether the analysis of the Sixth Circuit in *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986), or that of the Ninth Circuit in *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) *cert. denied*, 449 U.S. 1111 (1981) should be utilized to determine if there has been a violation of the law of New York for purposes of 18 U.S.C. §1955(a)?

3. Was petitioner Laughing improperly denied the 2 level reduction in sentencing to which he was entitled under the Sentencing Guidelines for acceptance of responsibility, when he accepted full personal responsibility for his conduct but continued to contest the District Court's jurisdiction, following his conditional guilty plea that allowed him to contest that jurisdiction?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

ELI TARBELL, ANTHONY LAUGHING, and PETER BURNS, SR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Eli Tarbell, Anthony Laughing and Peter Burns, Sr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit rendered in the above-entitled proceeding on January 7, 1991.*

*The parties to the proceeding in the United States Court of Appeals for the Second Circuit were the petitioners and Roderick Alex Cook, who was separately represented. Petitioners are informed that Mr. Cook is not interested in this further proceeding.

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported. It is reproduced in Appendix A, *infra*.

The opinion of the District Court for the Northern District of New York (McCurn, C.J.) is reported as *United States v. Burns, et al.*, at 725 F.Supp. 116 (N.D.N.Y. 1989). It is reproduced in Appendix B, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit is dated and entered January 7, 1991. By Order entered February 12, 1991, the Court of Appeals issued an Order extending the stay of execution of sentence that had previously been granted herein, and staying the issuance of the mandate pending the instant Petition.

The jurisdiction of this Court to review the judgments in question by writ of certiorari is conferred by Title 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The statutes involved in this petition are: 15 U.S.C. §1175; 18 U.S.C. §§1151; 1162; 1166; 1955(a); 3243; 25 U.S.C. §§232; 2701; 2703(6); 2703(7)(B)(ii); 2703(7); 2703(8); 2710(b)(2)(A); 2710(b)(3)(A); 2710(d)(6); U.S.S.G. §3E1.1; New York: Gen. Municipal Law §§187; 188(a); Penal Law §§225.30; 225.32; Tax Law §1604(a).

Their pertinent text is set forth in Appendix D, *infra*.

STATEMENT OF THE CASE

Petitioners [Tarbell, Laughing and Burns] were convicted of possession of a gambling device—a slot machine—in Indian Country in violation of Title 15 U.S.C. §1175.* Petitioners [Laughing and Burns] were also convicted of engaging in an illegal gambling business in violation of Title 18 U.S.C. §1955(a).* The convictions followed petitioners conditional guilty pleas, entered after their pre-trial motions for dismissal (based on the subject matter jurisdictional grounds that are the subject of this petition) were denied.

The conduct in question occurred on the St. Regis Indian Reservation which is located within the State of New York. Petitioners are members of the St. Regis Mohawk tribe.

Following entrance of his conditional guilty pleas, petitioner Laughing sought a reduction of 2 levels in his sentence pursuant to the "acceptance of responsibility" category of the Sentencing Guidelines (U.S.S.G. §3E1.1).

Judge McCurn declined to give Laughing a 2 level reduction for "acceptance of responsibility" on the grounds that Laughing did not admit he was wrong, acknowledge that he committed a crime, and indicate that he would never do it again.** Laughing had, however, in fact taken full responsibility for operating a casino, did not open the casino until after the Indian Gaming Regulatory Act had been signed, truly believed that what may be against the

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*Reference is made only to those convictions that survive by virtue of petitioners' conditional plea agreements.

**Apparently Judge McCurn was concerned that Laughing, after pleading guilty, told the news media that he disagreed with the District Court's jurisdictional rulings (JA-801a). Reference is to Petitioners' Joint Appendix in the Court of Appeals.

law in New York State is not necessarily against the law on the St. Regis Reservation, was glad to go to Court to decide the issue once and for all, and had reserved his right to further jurisdictional review by the Court of Appeals (JA-786a, 795a-798a, 799a-800a).

Laughing, based on a combined adjusted offense level of 17 (U.S.S.G. §§2E3.1; 2E3.3; 3B1.1(a); 3C1.1; 3D1.4; 3E1.1(a)), and a Criminal History category of 1 (U.S.S.G. §4A1.1), received twenty-four (24) months imprisonment on his conviction of 15 U.S.C. §§1175-1176, and concurrently twenty-seven (27) months on his conviction of 18 U.S.C. §1955(a). He was also ordered to pay a $10,000 fine on each of these two convictions.

Burns received a twenty-one (21) month term of imprisonment on his conviction of 18 U.S.C. §1955(a), and concurrently a twenty-one (21) month term of imprisonment on his conviction of 15 U.S.C. §§1175-1176. He was also ordered to pay a $2,000 fine on each of these two convictions.

Tarbell received, for his pre-guideline offense, an eighteen (18) month term of imprisonment, and a $5,000 fine.

On January 7, 1991, the Court of Appeals issued its decision, affirming, with one judge dissenting, the judgments of conviction. The majority of the Court of Appeals held that, as a matter of law, the St. Regis tribe is, within the framework of *United States v. Sandoval* (231 U.S. 28, 47-48 (1913)), a dependent Indian community, and, as such, the St. Regis Indian Reservation is Indian Country

within the meaning of Title 18 U.S.C. §1151.* The dissent believed that use of this Court's decision in *United States v. Sandoval* (*supra*) was not appropriate to determine if the St. Regis tribe is a dependent Indian community, and that an evidentiary hearing should be held on this issue since the evidence did not establish that the St. Regis tribe is a dependent Indian community.

The court also held that Title 25 U.S.C. §232 extended concurrent, not exclusive, jurisdiction to the State of New York over the St. Regis Indian Reservation. In addition, the court held that the Indian Gaming Regulatory Act (IGRA), Title 25 U.S.C. §2701 *et seq.*, and Title 18 U.S.C. §1166 did not preempt, or implicitly repeal Title 18 U.S.C. §1955. The court also held that, without regard to a criminal/prohibitory or civil/regulatory analysis, the conduct of utilizing slot machines violates New York State law.

The majority also held that Laughing was properly denied a reduction for acceptance of responsibility because his statements, contesting subject matter jurisdiction, did not demonstrate an acceptance of factual guilt contemplated by the U.S.S.G. §3E1.1 Application note 2. The dissent found that Laughing had accepted full personal responsibility for his criminal conduct in the operation of the casino in question. Therefore, he was entitled to a reduction for acceptance of responsibility even though he disagreed with the District Court's jurisdictional rulings.

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*The Court of Appeals incorrectly stated that only Cook argued, on appeal, that the District Court lacked subject matter jurisdiction because the St. Regis lands are not Indian Country, and the issue should have been submitted to the jury (Appendix A at 7a). However, petitioners also argued in the Court of Appeals that the area in question was not Indian Country, and, as such, there was no jurisdiction for their prosecutions (*See* Appellants' Brief, pp. 12,16,21; and Appellants' Reply Brief, pp. 4-5).

REASONS FOR GRANTING THE WRIT

The Court of Appeals acknowledged that the case at bar presents "important issues relating to the interpretation and application of several statutes" (Appendix A at 3a). This Court has the opportunity to clarify the recurring issue of criminal jurisdiction over the Indian reservations in the State of New York, as set forth in Title 25 U.S.C. §232, since there is a conflict between the Court of Appeals decision herein and prior decisions of this Court and the New York State Court of Appeals. The Court can also clarify whether Indian country within the meaning of 18 U.S.C. §1151 exists in New York State.

In addition, this case presents important issues concerning the parameters of the Indian Gaming Regulatory Act (IGRA), Title 25 U.S.C. §2701 *et seq.*, and the opportunity to resolve the recurring conflict between the positions expressed by the Sixth Circuit and the Ninth Circuit on the issue of whether it is correct to follow the "violation of State law analysis," or the "criminal/prohibitory—civil/regulatory analysis" which was not ripe for consideration in *California v. Cabazon Band of Mission Indians* (480 U.S. 202, 214 (1987)). Finally, the Court can determine and give guidance regarding the Sentencing Guidelines adjustment for "acceptance of responsibility" (U.S.S.G. §3E1.1) when a conditional jurisdictional plea of guilty is entered.

. . . as to 25 U.S.C. §232.

By virtue of 25 U.S.C. §232, the State of New York has exclusive jurisdiction to prosecute Indians for crimes committed by them on reservations in New York State. The Court of Appeals incorrectly interpreted the law to hold that the Federal Government has jurisdiction in this matter.

Title 25 U.S.C. §232 provides that:

> The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State . . .

In reaching the conclusion that the United States retained concurrent criminal jurisdiction with New York State over Indian reservations within the State, the Court of Appeals disregarded the plain language of the statute, ignored the legislative history of 25 U.S.C. §232, and erroneously read into that statute a reservation of federal jurisdiction not expressly contained therein but which was in fact expressly left out. Moreover, it peremptorily dismissed the repeatedly articulated understanding of this and other courts that 25 U.S.C. §232 was a surrender of all federal jurisdiction to the State of New York.

The plain language of 25 U.S.C. §232 makes it readily apparent that the State of New York has exclusive criminal jurisdiction over the instant offenses perpetrated by Indians on New York reservation lands in that it alone is given jurisdiction to the same extent that it would have jurisdiction if the offenses occurred anywhere else in the State of New York. (*See* 1948 U.S. Code Cong. & Admin. News, p. 2284).

In addition, the legislative history of 25 U.S.C. §232 demonstrates that Congress intended to confer upon the State of New York *exclusive* criminal jurisdiction over all crimes perpetrated by or against Indians on reservation lands. (*See Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal—State Regulations*, 8 Buffalo L. Rev. 1, 14-17 (1959)).

The New York State Legislature requested Congress to enact legislation conferring upon the State of New York criminal and civil jurisdiction over New York Indians (16 N.Y. Leg. Doc., 170th Sess., 12 (1947)). Subsequently, bills were proposed in Congress (S. 1683, S. 1687, 80th Cong. 1st Sess. (1947)) and hearings were held during which time a letter was written by the Under Secretary of the Interior which stated:

> It is suggested that the bill be amended by adding at the end: "Provided, that nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations." Such a provision was included in the act of Congress approved June 8, 1940 (54 Stat. 249 (Title 18 U.S.C. §3243)), transferring jurisdiction to the State of Kansas . . . (1948 U.S. Code Cong. & Admin. News, p. 2287).

However, despite the foregoing specific request, Congress chose *not* to include any such language, which would have retained federal jurisdiction, when it enacted 25 U.S.C. §232. Rather, Congress simply granted the State of New York—and none other—jurisdiction to prosecute all crimes committed by or against Indians on New York reservation lands. The Court of Appeals erroneously looked for adjectives such as "exclusive" or "complete," while ignoring the legislative history of 25 U.S.C. §232 (Appendix A at 11a).

Special jurisdictional acts, such as 25 U.S.C. §232, are to be strictly construed by the courts, and implications as to jurisdiction, under their terms, are forbidden. *Blackfeather v. United States*, 190 U.S. 368, 376-378 (1903); *see also Schillinger v. United States*, 155 U.S. 163, 168 (1894).

It is respectfully submitted that the Court of Appeals improperly read into 25 U.S.C. §232 an implication that jurisdiction had been expressly retained by the Federal Government.* In fact, the opposite is true. In 1953, Congress adopted 18 U.S.C. §1162 giving certain named states exclusive criminal jurisdiction over Indian country within those states. Subsequently, in tracing the legislative history of 18 U.S.C. §1162, it was noted:

> The history of the Act discloses that separate bills granting such jurisdiction to each of said five states, SIMILAR TO THE BILL GRANTING JURISDICTION TO THE STATE OF NEW YORK (25 U.S.C. §232), were pending in Congress at the time of the adoption of the general act. Congressional and Administrative News, 83rd Cong., 1st session, 1953, Vol. 2, p.2413 (emphasis added) (*Anderson v. Gladden*, 188 F. Supp. 666, 678-679 (D. Ore. 1960), *aff'd*, 392 F.2d 463 (9th Cir. 1961), *cert. denied*, 368 U.S. 949 (1961)).

Obviously, Congress did not include New York in the 1953 legislation because it had already given New York exclusive jurisdiction in 1948 by virtue of 25 U.S.C. §232.**

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*It should be noted that when Congress wanted to retain jurisdiction it specifically did so (compare 18 U.S.C. §3243 (Kansas), and 62 Stat. 1161, Pub. L. No. 846 (Iowa), with 25 U.S.C. §232).

**Public Law 280, and 18 U.S.C. §1162 were enacted to prevent lawlessness on Indian reservations (*California v. Cabazon Band of Mission Indians, supra* at 208). However, in 25 U.S.C. §232 the jurisdiction was given to the State of New York to facilitate the withdrawal of Federal services to the Indians in New York, and place them in the same status as other citizens (*United States v. Devonian Gas and Oil Company*, 424 F.2d 464, 468 (2nd Cir. 1970)). Therefore, it was incorrect for the Court of Appeals to interpret New York State's jurisdiction, as set forth in 25 U.S.C. §232, against that granted to other states in 18 U.S.C. §1162 (Appendix A at 12a-13a).

In support of and in recognition of the aforementioned history of 25 U.S.C. §232, this Court and other Courts have repeatedly stated, *without qualification*, that the statute was intended to confer upon the State of New York exclusive criminal jurisdiction over all crimes perpetrated by or against Indians on reservation lands. *See Washington v. Confederate Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471 n.8 (1979) (". . . Before 1953, there had been other *surrenders* of authority to some states . . ., 25 U.S.C. §232 (New York) . . ."); *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661, 679 (1974) (". . . criminal jurisdiction over New York Indian reservations was *ceded* to the State . . ."); *United States v. Devonian Gas & Oil Co.*, 424 F.2d 464, 468 (2d Cir. 1970) (". . . 25 U.S.C. §232, . . . *relinquished* the criminal . . . jurisdiction of the United States over New York Indians"); *Anderson v. Gladden*, 188 F.Supp. *supra* at 677 (". . . Congress *surrendered* to the state of New York *complete* jurisdiction over all crimes committed on Indian Reservations within the state of New York . . .").

In ordinary English usages *surrender* means "to give up", "to relinquish", "to yield", "to give up completely"; *cede* means "to give up", "to assign, transfer"; *relinquish* means "to withdraw from", "to abandon", "to cease from considering", "to assent to withdrawal"; *complete* means "entire" (*see, e.g.* Webster's Third New International Dictionary Unabridged (1963). Obviously, the Federal Government has retained no criminal jurisdiction over the St. Regis Indian Reservation in New York State. Yet petitioners herein were prosecuted by the Federal Government for their conduct on the St. Regis Indian Reservation.

Indeed, respondent itself has taken the position before the state courts in New York that those state courts have exclusive jurisdiction over crimes committed by Indians while on

reservation lands. In *People v. Edwards*, 104 Misc.2d 305(1980), *rev'd*, 78 A.D.2d 582 (1980), *aff'd*, 64 NY2d 658 (1984), Edwards, an American Indian, had committed a murder on an Indian Reservation in New York State. The trial court held that by virtue of Title 18 U.S.C. §1153 the Federal Government had exclusive jurisdiction to prosecute that Indian. (*People v. Edwards*, 104 Misc.2d *supra*).

Respondent, however, advised the New York Courts that:

> (i)n light of the well recognized canons of statutory construction, the facial language of 25 U.S.C. §232 and the cases and legislative history supporting its plain meaning, New York courts have EXCLUSIVE criminal jurisdiction over crimes committed by Indians while on reservation lands . . . (emphasis added) (*Amicus Curiae* Brief on behalf of the United States of America, U.S. Attorney, Northern District of New York, p. 16, *People v. Edwards*, 64 N.Y.2d *supra*).

The New York State Appellate Division, and the New York State Court of Appeals, agreeing with respondent, held that New York State had the jurisdiction to prosecute that Indian (*People v. Edwards*, 78 AD2d, *supra*; 64 NY2d *supra*).

Obviously, respondent argues one jurisdictional position in regard to 25 U.S.C. §232 in the New York Courts, and another in Federal Courts.*

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*Respondent, in the instant case, did not disclose this "double standard" to either the District Court, or to the Court of Appeals for the Second Circuit.

. . . as to Indian Country.

If 25 U.S.C. §232's grant of jurisdiction to New York is exclusive, that alone is enough to render prosecutions by the Federal government void. But even if 25 U.S.C. §232 is not found to have granted exclusive criminal jurisdiction to New York State, it must nevertheless still be proven that the conduct in question occurred in Indian country, which is the basis for the Federal Government's assertion of criminal jurisdiction over petitioners. (*See, e.g.*, 15 U.S.C. §1175 and 18 U.S.C. §1151).

However, the St. Regis Reservation within New York State does not fall within the framework of this geographical Indian criminal statute (15 U.S.C. §1175) which has no effect in New York State since New York reservations are not Indian country within the definition of 18 U.S.C. §1151.

The majority at the Court of Appeals, relying on *United States v. Sandoval* (231 U.S. 28, 47-48 (1913)), found that the area in question is a dependent Indian community within 18 U.S.C. §1151(b). The holding was based on the fact that the area had been set aside by the Treaty of 1796 for use by the St. Regis Mohawks; that the tribe members live there; that the tribe is federally recognized as eligible to receive assistance from the BIA; that the BIA provides funding for education, housing and training programs, social services, the administration of tribal government, and loan guarantees; that the BIA plans and funds roads within the area, and has as its only "trust responsibility" the maintaining of the integrity of the land and resources (Appendix A at 9a).

It is respectfully submitted that any reliance by the Court of Appeals on this Court's holding in *United States v. Sandoval* (*supra*) to determine the issue of jurisdiction is mis-

placed. When the State of New Mexico was admitted into the Union, Congress specifically indicated that "Indian" and "Indian country" shall include the Pueblo Indians themselves, and the lands they own or occupy (*United States v. Sandoval, supra* at 37, n.1). This Court's holding in *Sandoval* (*supra* at 47-48) as to dependency was based upon Congress' designation regarding the Pueblos.

However, no such Congressional expression of Indian country exists in regard to the St. Regis Mohawk Indians or New York State.* In fact, after Congress revised the definition of Indian country in 18 U.S.C. §1151, it was apparent that there was a serious question in Congress as to whether reservations in New York State were ever properly considered to be Indian country (H. Rep. No. 237, 82d Cong. 2d Sess. June 27, 1952, p. 4). Congress, in a *proposed* revision of Indian jurisdiction (H.R. 6036), which never became law, went so far as to add to the designation regarding New York that Indian country specifically included the Indian reservations in New York State (*Id.* at p. 1).

It should also be noted that the legislative history of the Indian Crimes Act of 1976 indicates that New York State is a recognized exception to Indian country. (*See*, 1976, U.S. Code Cong. and Admin. News, p. 1127).

In addition, there was no showing beyond a reasonable doubt that the St. Regis tribe is "dependent" on the federal government. There is no evidence that the St. Regis tribe "relies on another for support" or "lacks the necessary means of support and receives aid from others" (*See, e.g.*, Webster's Ninth New Collegiate Dictionary (1985); Webster's Third New International Dictionary Unabridged

*Congress, in enacting 25 U.S.C. §232, made no reference to Indian country in regard to New York State's jurisdiction, but did refer to Indian country when it enacted 18 U.S.C. §1162 in regard to five other states.

(1963)). The legislative history of 15 U.S.C. §1175 reveals that the Attorney General indicated that the provisions thereof are to be applicable to ". . . places under the exclusive or concurrent jurisdiction of the Federal Government . . ." (1950, U.S. Code Cong. & Admin. News, p. 4250). As has been shown, the Federal Government does not have either exclusive or concurrent jurisdiction over the St. Regis Reservation in New York State.

Therefore, the provisions of 15 U.S.C. §1175 do not apply to the St. Regis Reservation. Had there been, for example, a retrocession of jurisdiction by the State of New York, then the provisions of Title 18 U.S.C. Chapter 53 would apply to the St. Regis Reservation. (*See United States v. Menominee Indian Tribe of Wisconsin*, 694 F.Supp. 1373, 1374 (E.D. Wis. 1988)).

Moreover, it is not necessary for a court to extend the breath of 18 U.S.C. §1955(a) since New York State gambling laws would otherwise apply to the St. Regis Reservation (*cf., United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986); *United States v. Farris*, 624 F.2d 890, 895 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981); and *United States v. Menominee Indian Tribe of Wisconsin, supra* at 1374—all situations where there would have been no regulation of gambling on the Indian lands if the provisions of 18 U.S.C. §1955(a) had not been extended thereto)

. . . as to the IGRA.

If it is determined that the Federal Government has jurisdiction in this matter, then it is necessary to consider whether the Indian Gaming Regulatory Act (IGRA) pre-

empted* 18 U.S.C. §1955(a), through the comprehensive regulation of Indian Gaming (Title 25 U.S.C. Chapter 29), and the addition of 18 U.S.C. §§1166, 1167, and 1168.

In 25 U.S.C. §2701, Congress found that the existing federal law did not provide clear standards or regulations for the conduct of gaming on Indian land. It is further stated therein that Indian tribes have the exclusive right to regulate gaming activity on Indian lands if (1) the gaming activity is not specifically prohibited by federal law, and (2) is conducted in a state which does not as a matter of criminal law and public policy prohibit such activity. If a particular activity is permitted at all, even if it is heavily regulated and penalties imposed for violations, the activity may be legally undertaken without the necessity of compliance with state regulations. (25 U.S.C. §2701).

As the Court of Appeals found, the Congressionally declared purpose of the IGRA was to provide a statutory and regulatory basis for the operation of Indian gambling, and to establish an independent federal authority as well as independent standards for Indian gaming on Indian lands. (25 U.S.C. §2702(3)). The enactment of this statutory regulation was to promote tribal economic development and self-sufficiency in addition to shielding tribes from the influence of organized crime.

The Court of Appeals later states, however, that it would be illogical to suppose Congress, with the enactment of the

*The Court of Appeals chose to use the term "repeal" instead of "pre-empt" and went through an in-depth implicit repeal analysis. (Appendix A at 13a-17a). However, the legislative history clearly utilizes the term "pre-empt" instead of "repeal." (Senate Report No. 100-446, 1988 U.S. Code Cong. & Admin. News, pp. 6, 36; Senate Report, 1988 U.S. Code Cong. & Admin. News, p. 12). Obviously, the Court of Appeals has ignored the legislative history and clouded the issue with its repeal analysis.

IGRA, intended to punish extensive gambling businesses under state misdemeanor statutes just because they are conducted in Indian country. (Appendix A at 16a). It is not clear why the Court of Appeals ignores its earlier finding on the purpose of the IGRA, of enacting a separate and distinct regulatory scheme for Indian gaming on Indian land.

The Court of Appeals held that "where two statutes are capable of coexistence, it is the duty of the Courts absent a clearly expressed congressional intention to the contrary to regard each as effective." (Appendix A at 13a-14a). It should be noted that the congressional history of the IGRA clearly expressed a congressional intent to pre-empt 18 U.S.C. §1955(a).

Title 25 U.S.C. §2710(d)(6) provides that only 15 U.S.C. §1175, which is a ban on all gambling devices, survives the enactment of the IGRA, and that all other prosecutions for violations of gambling laws *MUST* be brought pursuant to 18 U.S.C. §1166. As such, a prosecution for possession of slot machines in Indian Country should be brought pursuant to 15 U.S.C. §1175 or 18 U.S.C. §1166. The IGRA does not allow for prosecutions under 18 U.S.C. §1955(a). Obviously, petitioners Laughing and Burns were prosecuted under the wrong statute, as 18 U.S.C. §1955(a) did not survive the enactment of the IGRA.

With respect to the criminal sanctions for violations of the IGRA, 18 U.S.C. §1166 provides that federal law assimilates all state laws pertaining to licensing, regulation or prohibition of gambling, including but not limited to criminal sanctions, and imposes these assimilated state laws to Indian country the same as such laws apply elsewhere in that state. The United States is given *exclusive*

jurisdiction over criminal prosecutions made applicable under 18 U.S.C. §1166(a).*

The IGRA divides gaming into three classes. (25 U.S.C. §2703). Class I gaming (25 U.S.C. §2703(6)) includes social games with prizes of minimal value and traditional forms of Indian gaming engaged in at tribal ceremonies. Class II gaming (25 U.S.C. §2703(7)) includes bingo, pull tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo and in certain instances, card games and electronic or electro-mechanical facsimiles of any games of chance and slot machines. Class III gaming includes all forms of gaming not Class I or Class II. (25 U.S.C. §2703(8)). The Senate Select Committee Report on the IGRA, as well as the floor debate of the Senate and House, clearly show that it was the intent of Congress to pre-empt 18 U.S.C. §1955(a). (*See* Senate Report No. 100-446, 1988 U.S. Code Cong. & Admin. News, pp. 6, 36; Senate Report, 1988 U.S. Code Cong. & Admin. News, p. 12).

In further support of this conclusion is the Congressional Record of the United State Senate of September 15, 1988, at S. §§12650 and 12651, where Senator Reid and Chairman Inouye discuss the IGRA's effect on 15 U.S.C. §1175 and Class III gaming and *not* Class II gaming, and there was absolutely no discussion of 18 U.S.C. §1955(a) surviving the enactment of the IGRA (Cong. Rec. S12650 (daily ed. Sept. 15, 1988) (statement of Sen. Reid); Cong. Rec. S12650-12651 (daily ed. Sept. 15, 1988) (statement of Sen. Inouye)).

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*Such a grant of exclusive Federal jurisdiction directly conflicts, in New York State, with 25 U.S.C. §232, as well as the fact that Indian country does not exist in New York State. That conflict need not be resolved here, of course, since petitioners were *not* prosecuted under §1166. Prosecutions under 15 U.S.C. §1175 have been ceded to New York State, as argued *supra*.

It should be noted that a St. Regis Mohawk Tribal Chief had made an application to the Governor of New York to negotiate a Tribal-State Compact pursuant to 25 U.S.C. §2710(b)(3)(A) which would govern the conduct of Class III gaming activities, thereby removing the games described in 25 U.S.C. §2703(7)(B)(ii) from the requirements of Class III gaming, and included them as Class II activities during the one-year grace period (*See* 25 U.S.C. §2710(b)(2)(A)). Clearly, then, such activity would be legal in New York State.

Had the Court of Appeals simply reviewed the legislative history of the IGRA, there would be no doubt that it was Congress' express intention that the IGRA would "preempt" 18 U.S.C. §1955(a).

. . . as to the conflict between the 6th and 9th Circuit.

If it is determined that 18 U.S.C. §1955(a) has not been pre-empted by the IGRA, the convictions were nonetheless improper; the allegations contained in the instant indictments do not set forth a violation of 18 U.S.C. §1955(a).

Whether the alleged activities were in violation of 18 U.S.C. §1955(a) depends on whether the "criminal/prohibitory or civil/regulatory test" is applied, or whether the "violation of state law" test is applied. There exists a direct conflict between the Circuit Courts concerning which analysis to use.

The Ninth Circuit in *United States v. Farris* (624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981)) held, in order for a gaming activity to constitute a violation of the law of a state for purposes of 18 U.S.C. §1955(a), the activity must violate the public policy of the state. The test for the application of state law pursuant to 18 U.S.C.

§1955(a) is the same as that for the Public Law 280 states (18 U.S.C. §1167; 25 U.S.C. §1321-1326; 28 U.S.C. §1360) analysis. (*See Barona v. Duffy*, 694 F.2d 1185, 1190 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983)). For the analysis of this issue, the State of New York may be considered a "Public Law 280 jurisdiction," though it is not, as the result of 25 U.S.C. §§232 and 233.

Under this test, while a Public Law 280 state may impose on Indian reservations state criminal laws which prohibit certain activities, the state may not so impose general civil laws which merely regulate the activity. (*See California v. Cabazon Band of Mission Indians, supra* at 208; *Barona v. Duffy, supra* at 1188).

The Field Solicitor for the United States Department of the Interior has stated:

> If a particular activity is permitted at all, even though it may be heavily regulated and penalties imposed for violations of such regulations, the activity may be legally undertaken by Indians on Indian reservations without the necessity of compliance with the regulations. The Gaming Act §11(b)(1)(a) is Congressional acceptance of that rule (Letter of U.S. Dept. of the Interior Field Solicitor Mariana R. Shulstad to U.S. Attorney James G. Arnold, dated Jan. 9, 1989). (Appendix C).

New York law regulating black jack, dice, baccarat, money wheels and slot machines is quite clear. Pursuant to the local option provisions for conduct of games of chance by certain organization under General Municipal Law §187, New York State grants every municipality the right, power and authority to authorize the conduct of games of chance within the territorial limits of the municipalities.

The New York General Municipal Law §188(a) authorizes, and the New York Waging Board has approved, the following games: craps, roulette, black jack, money wheel, chuck-a-luck, merchandise wheel, over and under 7, beat the dealer, big 9, color wheel, joker 7, horse race wheel, best poker hand, bell jars, and bang.

The Court of Appeals held that New York flatly prohibits the operation of slot machines for gambling purposes. (Appendix A at 18a). However, slot machines are clearly merely regulated in the State of New York, for *no* absolute prohibition of slot machines exist in New York.

First, as the Court of Appeals noted, the State of New York permits the possession of slot machines manufactured prior to 1941. (Appendix A at 18a) (*See* New York Penal Law §§225.30 and 225.32).

Second, the State of New York permits the use of slot machines for the conduct of lawful gaming activities. (*See* New York Penal Law §§225.30 and 225.32).

Third, the Lottery for Education Act, New York State Tax Law §1604(a)(8) authorizes the promulgation of Rules and Regulations for the establishment and operation of *mechanical devices of any kind.*

Fourth, as the Court of Appeals noted, the State of New York permits slot machines to be manufactured in the State of New York. (Appendix A at 18a) (*See* New York Penal Law §225.32).

Clearly, the local and state laws governing the gaming activities were civil and regulatory in nature, and therefore were not applicable on the St. Regis Reservation; since the operation of such gaming activity on the reservation did not

violate state policy, it could not be a federal offense. (*See Barona v. Duffy, supra*).

As such, if the Ninth Circuit's *United States v. Farris* (*supra*) analysis were utilized in the instant case, it would be determined that the activity was merely regulated by New York law and therefore was not in violation of the law of the state. Hence, there would be no violation of 18 U.S.C. §1955(a).

The Sixth Circuit has differed from the Ninth Circuit's analysis, and in *United States v. Dakota* (666 F. Supp 989 (W.D. Mich. 1985), *aff'd*, 796 F.2d 186 (6th Cir. 1986)) set forth the "violation of state law" analysis.

In this analysis, the Sixth Circuit held that the 18 U.S.C. §1955 standard is simply whether the gambling activity is being operated in violation of the law of the state in which it is being conducted. (*See United States v. Dakota, supra*). The Sixth Circuit further held that the criminal/prohibitory—civil/regulatory test is inappropriate to an interpretation of 18 U.S.C. §1955. (*United States v. Dakota, supra*).

Petitioners' activities did not violate any criminal/ prohibitory laws, but only civil-regulatory laws. However, if no distinction is made between criminal/prohibitory and civil/ regulatory laws, under this analysis the activities would always constitute a violation of state law for purposes of 18 U.S.C. §1955.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214 (1987), this Court held that it was not necessary to address the conflict between the circuits in order to decide that case. However, in the instant case, the conflict is ripe and necessary to be determined in order to decide the

outcome. It is necessary to determine which analysis applies because if the criminal/prohibitory—civil/regulatory analysis is utilized then petitioners' activities on the St. Regis Reservation were not criminal in nature but merely regulated. Thus such activities on Indian land were clearly not a violation of *state* law for the purposes of 18 U.S.C. §1955(a).

In the instant case, the District Court in fact declined to follow the Ninth Circuit's *United States v. Farris* (*supra*) rationale. (Appendix B at 22b). Rather it chose the conflicting "violation of state law" analysis of the Sixth Circuit in *United States v. Dakota* (*supra*). (Appendix B at 22b).

The Court of Appeals appeared to avoid the conflict between the Circuits by saying that petitioners' activities were flatly prohibited in New York, but in fact it chose the Sixth Circuit's "violation of state law" analysis of *United States v. Dakota* (*supra*). (Appendix A at 17a-18a). As shown above, this analysis would lead to a determination that petitioners' activities violated the law of New York. However, had the Court of Appeals chosen the Ninth Circuit's criminal/prohibitory—civil/regulatory analysis of *United States v. Farris* (*supra*) and applied it properly, the outcome would have been different.

This recurring conflict among the circuits will continue to arise as courts are uncertain of which analysis to apply. Clearly, there is a great difference in the outcome of the cases depending on which of the conflicting analyses are applied. The conflict can only be resolved by action of this Court.

. . . as to the sentence.

In affirming the District Court's denial to Laughing of a reduction of sentence, the majority of the Court of Appeals took one statement by Laughing at Sentencing, out of context, to support its holding that Laughing did not accept his factual guilt. (Appendix A at 23a).

However, Laughing took full responsibility for operating the casino, he did not open the casino until after the IGRA had been signed, he truly believed that what may be against the law in New York State is not necessarily against the law on the St. Regis Reservation, he was glad to go to court to decide the issue once and for all, and he had reserved his right to further jurisdictional review.

> I take full responsibility as running the place. I never denied the fact that I am the owner of T.V.I. I believe that what may be against the law in New York State is not necessarily against the law on the reservation. We are a sovereign nation, whether Mr. Brunetto wants to believe it or not. And I gladly—
>
> Mr. Brunetto: Well, your Honor.
>
> The Defendant: Wait a minute. Just a minute. And I gladly go to court to decide this once and for all. I have never engaged in any violence on that reservation or off the reservation. Yes, there may be weapons there. Any other casino in the country also has arms security. They passed this Indian Gambling Regulatory Act. I did not open up until after it was signed by the president of the United States which allows certain forms of gambling on Indian reservations. And I will go to my grave saying that I did nothing wrong (JA-785a-786a).

Since Laughing accepted personal responsibility for his criminal conduct, he should not be penalized because, as an Indian, he has a good faith belief in the sovereignty of his Indian Nation. (*See United States v. Mazurie*, 419 U.S. 544, 547 (1975)).

The sentence, "I will go to my grave saying I did nothing wrong" was taken out of context by the majority at the Court of Appeals in finding that Laughing did not accept responsibility. (Appendix A at 23a). It is respectfully submitted that the sentence, when viewed in its proper context, refers to the underlying jurisdictional dispute, and is not an attempt to avoid factual guilt. Even a defendant who goes to trial to preserve issues that do not relate to his factual guilt is entitled to a 2 level reduction for acceptance of responsibility. (*See* U.S.S.G. §3E1.1, comment (n.2)).

Guilty pleas are encouraged because they conserve prosecutorial and judicial resources and advance speedy trial objectives. Moreover, a procedure that allows for the conditional guilty plea herein is a "commendable effort to relieve the problem of congested trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution." (*See Lefkowitz v. Newsome*, 420 U.S. 283, 293 (1975)).

As such, Laughing was improperly denied a 2 level reduction for acceptance of responsibility because he contested the jurisdictional issues that his conditional guilty plea allowed him to do. (U.S.S.G. §3E1.1; *see* Federal Rules of Criminal Procedure, Rule 11(a)(2)).

In any event, the uniformity of the Sentencing Guidelines structure would best be served by direction from this Court as to the parameters of the acceptance of responsibility reduction.

CONCLUSION

For the reasons above stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A—Opinion of the United States Court of Appeals for the Second Circuit, Dated January 7, 1991.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 76, 105, 106, 107—August Term, 1990

(Argued September 10, 1990 Decided January 7, 1991)

Docket Nos. 90-1070, -1072, -1168, -1179

UNITED STATES OF AMERICA,

Appellee,

—against—

RODERICK ALEX COOK, ELI TARBELL, ANTHONY LAUGHING and GERALD LAUGHING, JAMES JOSEPH BURNS,

Defendants,

RODERICK ALEX COOK, ELI TARBELL and ANTHONY LAUGHING,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

—against—

PETER BURNS, SR.,

Defendant-Appellant,

Before:

WINTER and MINER, *Circuit Judges*
and LASKER, *Senior District Judge.**

Consolidated appeals from judgments of conviction and sentence entered in United States District Court for the Northern District of New York (McCurn, *C.J.* and Van Graafeiland, *J.*, sitting by designation) following conditional pleas of guilty by three defendants and jury trial of charges against another defendant for violations of 15 U.S.C. § 1175, which prohibits possession of slot machines in Indian country and 18 U.S.C. § 1955, which prohibits the operation of illegal gambling businesses.

Affirmed.

Judge Lasker dissents in a separate opinion.

JOHN A. PIASECKI, Malone, N.Y. (Vaughn N. Aldrich, Hogansburg, N.Y., of counsel), *for defendant-appellant Cook.*

JOHN A. CIRANDO, Syracuse, N.Y. (D.J. Cirando and Patrick J. Haber, Syracuse, N.Y., of counsel, Mary B. Ruddy, law student, on the brief), *for defendants-appellants Tarbell, Laughing and Burns.*

* Of the United States District Court for the Southern District of New York, sitting by designation.

EZRA FRIEDMAN, Department of Justice, Washington, D.C. (Frederick J. Scullin, Jr., United States Attorney for the Northern District of New York, Syracuse, N.Y., of counsel), *for appellee*.

Raymond E. Kerno and Elliot I. Susser, Lake Success, N.Y. (Lysaght, Lysaght & Kramer, Lake Success, N.Y., of counsel), *filed a brief for amicus curiae James Burns*.

MINER, *Circuit Judge*:

Defendants-appellants Eli Tarbell, Anthony Laughing and Peter Burns, Sr. appeal from convictions entered on January 16, 1990, February 26, 1990 and February 27, 1990, respectively, in the United States District Court for the Northern District of New York. Tarbell pled guilty to the unlawful use and possession of gambling devices in Indian country. 15 U.S.C. § 1175 (1988). Laughing and Burns pled guilty to violations of section 1175 and to the operation of illegal gambling businesses. 18 U.S.C. § 1955 (1988). Defendant-appellant Roderick Alex Cook was found guilty, following a jury trial, of violating section 1175.

In pre-trial motions to dismiss their indictments, appellants raised important issues relating to the interpretation and application of several statutes. They claimed that the district court lacked subject matter jurisdiction because the offenses for which they were prosecuted did not occur in Indian country, as required by section 1175. Appellants maintained that 25 U.S.C.

§ 232 (1988) granted exclusive prosecutorial jurisdiction to the State of New York, precluding the federal prosecutions in their cases. They also argued that both 15 U.S.C. § 1175 and 18 U.S.C. § 1955 were preempted by the enactment of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* (1988), and of 18 U.S.C. § 1166 (1988), which provides criminal penalties for violations of the IGRA; that the IGRA's grace period applies to the activities of Tarbell, Laughing and Burns; and that even if the IGRA did not preempt the statutes at issue, the government failed to prove that their activities violated state law, an essential element of an offense under section 1955. Other contentions were that section 1175, as applied, violates equal protection principles and that the government must prove that Tarbell and Laughing knew their conduct violated the law.

In denying the motions, Judge McCurn rejected all arguments advanced by appellants. The same arguments are advanced on this appeal. In addition, appellant Cook challenges the sufficiency of the evidence presented to the jury, particularly with respect to the government's proof that he operated "slot machines." Appellants Laughing and Burns challenge their sentences. They object to the four level increase in offense levels for "role in the offense." Laughing objects to Judge McCurn's refusal to grant him a two level reduction in sentence for "acceptance of responsibility." We affirm the district court in all respects.

BACKGROUND

Roderick Alex Cook was convicted after a jury trial of the use and possession of gambling devices in Indian country under 15 U.S.C. § 1175. The conviction stems

from the events of December 16, 1987, when the New York State police raided Cook's establishment, the Night Hawk Cafe, and seized 62 slot machines. The conviction of Eli Tarbell for the same offense arose in consequence of the events of December 16, 1987, when the police entered his restaurant, Bear's Den, and seized 77 slot machines. On September 14, 1988 and June 6, 1989, the police again raided the restaurant and seized an additional 82 slot machines.

Anthony Laughing, owner of Tony's Vegas International ("TVI"), was convicted of, *inter alia*, conducting an illegal gambling business, in violation of 18 U.S.C. § 1955, and the use and possession of slot machines in Indian country, in violation of 15 U.S.C. § 1175. Among other gaming materials observed at TVI, during a police raid on June 6, 1989, were 148 slot machines, 7 black jack tables, 3 poker tables, 2 roulette wheels and 1 "craps" table.

Peter Burns, Sr., co-owner of Burns Casino, was also convicted of violating 18 U.S.C. § 1955 and 15 U.S.C. § 1175. His gambling business included the operation of slot machines, black jack tables and roulette wheels.

All of appellants' alleged gambling establishments were located in the town of Bombay, Franklin County, New York. That area is home to appellants' Indian tribe, the St. Regis Akwesasne Mohawk Indians.

Prior to trial, appellants moved to dismiss the indictments on the ground that the court lacked subject matter jurisdiction because the offenses for which they were indicted did not occur in Indian country as defined by 18 U.S.C. § 1151. They claimed that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*,

and 18 U.S.C. § 1166, which provides criminal penalties for violations of the IGRA, "preempted" the application of 15 U.S.C. § 1175 and 18 U.S.C. § 1955. After a hearing, Judge McCurn ruled as a matter of law that the events occurred in Indian country. Similarly, he rejected the claim that 15 U.S.C. § 1175 and by 18 U.S.C. § 1955 were superceded by the IGRA and 18 U.S.C. § 1166. *United States v. Burns*, 725 F. Supp. 116, 124 (N.D.N.Y. 1989).

Tarbell, Laughing and Burns entered conditional pleas of guilty, after their motions to dismiss the indictments were denied by Judge McCurn. Only Cook proceeded to trial.

At trial, the government introduced evidence, including the testimony of an employee of the Bureau of Indian Affairs ("BIA"), that the events occurred in Indian country. Also, the written decision of Judge McCurn disposing of the pre-trial motions was received by the trial judge (Van Graafeiland, *J.*).

After the government rested, Cook moved for a directed verdict of acquittal on the ground that the government failed to prove that he owned slot machines as defined by the statute. In response to Cook's assertion that expert testimony must be presented establishing that the slot machines each contained a "drum or reel with insignia" or that upon application of an element of chance, money or property was dispensed, the judge stated: "The machine is right here before the jury. It's very obvious what it is. I think very few people haven't seen a slot machine at some time or other, and this is obviously a slot machine." The court denied the motion.

On the issue of Indian country, the judge asked the defense if it had any evidence demonstrating that the St. Regis lands were not in Indian country. Besides the introduction of the Treaty of 1796, for the purpose of showing that the St. Regis Indians were not within Indian country, no other evidence was presented. The court then ruled from the bench that the area at issue was located in Indian country.

DISCUSSION

I. *Jurisdictional claims*

After a jury trial conducted by Judge Van Graafeiland, Cook was convicted of using slot machines in Indian country, in violation of 15 U.S.C. § 1175. Only he argues, on appeal, that the district court lacked subject matter jurisdiction because the St. Regis lands are not Indian country and should have submitted the issue to the jury in any event.

Section 1175 provides, in relevant part, that:

> It shall be unlawful to . . . possess, or use any gambling device . . . within Indian country as defined in [18 U.S.C. § 1151].

Section 1151 defines Indian country as:

> (a) all land within the limits of any Indian *reservation* under the jurisdiction of the United States Government . . ., (b) all *dependent Indian communities* within the borders of the United States . . . and (c) all Indian *allotments*, the Indian titles to which have not been extinquished . . . .

18 U.S.C. § 1151 (emphasis supplied). The government contends that the activities for which Cook was prosecuted occurred in Indian country because the St. Regis tribe is within a "reservation" or, in the alternative, is a "dependent Indian community." Cook argues that it is neither of those. Both the government and Cook provided extensive evidence of the origins of the tribe in support of their contention that it is or is not within a "reservation." We find it unnecessary to resolve the issue of whether the St. Regis tribe is within an Indian "reservation" because the evidence reveals that it is a dependent Indian community.

To determine whether a particular Indian tribe is a dependent community, it is necessary to examine the (1) nature of the area; (2) the relationship of the inhabitants in the area to the Indian tribes and the federal government; and (3) the established practice of government agencies toward that area. *United States v. Martine*, 442 F.2d 1022, 1023-24 (10th Cir. 1971); *see State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390-91 (9th Cir. 1988); *United States v. Azure*, 801 F.2d 336, 338-39 (8th Cir. 1986); *United States v. Levesque*, 681 F.2d 75, 77-78 (1st Cir.), *cert. denied*, 459 U.S. 1089 (1982). "The phraseology in issue thus seems intended to afford federal criminal jurisdiction over [offenses] committed by Indians in communities which . . . are both 'Indian' in character and federally dependent." *Levesque*, 681 F.2d at 77.

On the issue of Indian country, the trial judge initially received into evidence the Treaty of 1796—entered into between the United States, the State of New York and the St. Regis Mohawks—which established a six-mile tract of land for the occupancy of the St. Regis Indians.

See St. Regis Tribe of Mohawk Indians v. State, 5 N.Y.2d 24, 29, 152 N.E.2d 411, 412, 177 N.Y.S.2d 289, 291 (1958), *cert. denied*, 359 U.S. 910 (1959). Additionally, evidence on the nature of the area, the inhabitants and the relationship between the federal government and the Indians was provided by Dean A. White, an employee of the BIA.

White testified that the six-mile area is inhabited by approximately 3,000 St. Regis Mohawk Indians. He further testified that the tribe is a federally recognized tribe. *See* 51 Fed. Reg. 25,115 (1986) (tribe recognized as having a "special relationship" with the United States). The BIA provides the St. Regis tribe with monies for education, housing and training programs, social services and the administration of the tribal government. Loans to both the tribe and its individual members are guaranteed by the BIA. Finally, the BIA is involved in the planning and funding of roads within the reservation and is charged with maintaining the integrity of the lands and resources. We think that there was ample evidence from which Judge Van Graafeiland properly could conclude that the St. Regis tribe is a dependent community. *See United States v. Sandoval*, 231 U.S. 28, 47-48 (1913).

Cook also takes issue with the failure of Judge Van Graafeiland to submit the question of whether the area at issue was a dependent Indian community and with his instruction to the jury to that effect. The jury was instructed that it need only decide whether the offenses charged in the indictment occurred.

In cases where the exercise of federal jurisdiction over a geographic area is necessary to vest jurisdiction in the federal courts, the court may determine as a matter of

law the existence of such jurisdiction. *United States v. Jones*, 480 F.2d 1135, 1138 (2d Cir. 1973) (the issue of acceptance of federal jurisdiction over VA hospital was properly decided by the judge not the jury); *see also United States v. Gipe*, 672 F.2d 777, 779 (9th Cir. 1982). Determinations of whether the site of an offense is Indian country have been held to be for the court alone. *United States v. Sohappy*, 770 F.2d 816, 822 n.6 (9th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986); *United States v. Deon*, 656 F.2d 354, 357 (8th Cir. 1981); *United States v. Morgan*, 614 F.2d 166, 170-71 (8th Cir. 1980); *Levesque*, 681 F.2d at 78 ("Whether the crime occurred in Indian country was thus a jurisdictional fact susceptible of determination without reference to any of the facts involved in determining . . . guilt or innocence."). In this case the question of whether the St. Regis territory is Indian country was one properly decided by Judge Van Graafeiland without submission of the issue to the jury.

Tarbell, Laughing and Burns also argue that by virtue of 25 U.S.C. § 232, New York State has exclusive jurisdiction to prosecute Indians for crimes committed by them on reservations within the state. 25 U.S.C. § 232 provides, in pertinent part, that:

> The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State.

Appellants invite us to interpret the statute as a complete surrender of all jurisdiction to the State of New York. The district court found that prior to the enact-

ment of section 232, the federal government had exclusive jurisdiction to prosecute crimes committed by or against Indians within Indian country. It held that absent an explicit abdication of federal jurisdiction by Congress in section 232, none could be implied. *Burns*, 725 F. Supp. at 122. We agree with that holding, but address some of appellants' arguments advanced against it.

Our analysis " 'must begin with the language of the statute itself.' " *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 580 (1982) (quoting *Dawson Chemical Co. v. Rohm & Haas*, 448 U.S. 176, 187 (1980)). Moreover, "[j]urisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' " *Palmore v. United States*, 411 U.S. 389, 396 (1973) (quoting *Cheng Fan Kwok v. Immigration & Naturalization Serv.*, 392 U.S. 206, 212 (1968)).

The text of section 232 provides that "The State of New York shall have jurisdiction." Plainly absent are the terms "exclusive" or "complete." The legislative history also does not support the interpretation urged by appellants. Significantly absent is any allusion to a complete surrender of jurisdiction. H.R. Rep. 2355, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. Serv. 2284 ("H.R. Rep. 2355"). Appellants refer to a letter written by the Undersecretary of the Department of the Interior, in which he suggested that the proposed bill include an express reservation of federal jurisdiction. H.R. Rep. 2355, at 2286-87. They maintain that by rejecting the suggestion, Congress therefore desired to relinquish all federal authority. The failure of

Congress to adopt this recommendation, however, is not a telling indication of congressional intent.

Appellants also cite a host of cases in support of the contention that section 232 granted exclusive jurisdiction to New York State. *See, e.g., Washington v. Confederated Band of Yakima Indian Nation*, 439 U.S. 463, 471 n.8 (1979) (section 232 surrendered authority to New York State); *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661, 679 (1974) ("New York and federal authorities eventually reached partial agreement in 1948 when criminal jurisdiction over New York Indian reservations was ceded to the State"); *United States v. Devonian Gas & Oil Co.*, 424 F.2d 464, 468 (2d Cir. 1970) (section 232 "relinquished the criminal and civil jurisdiction of the United States over New York Indians"); *Anderson v. Gladden*, 188 F. Supp. 666, 677 (D. Or. 1960) (section 232 "surrendered to the state of New York complete jurisdiction over all crimes committed on Indian Reservations within the state"), *aff'd*, 293 F.2d 463 (9th Cir.), *cert. denied*, 368 U.S. 949 (1961). These cases are not controlling because none resolved the jurisdictional issue presented here. Other cases cited by appellants in support of their contention do not mention abdication of jurisdiction. *See, e.g., People v. Edwards*, 78 A.D.2d 582, 582, 432 N.Y.S.2d 567, 568 (4th Dep't 1980) ("jurisdiction . . . was granted to New York in 1948 by the enactment of section 232").

The plain language of the statute leads us to conclude that section 232 extended concurrent jurisdiction to the State of New York. If Congress intended by enacting 25 U.S.C. § 232 to surrender all federal jurisdiction, it could have said so in 1948 when section 232 was

enacted. That is exactly what it did in 1970 when it amended 18 U.S.C. § 1162 to give six states *exclusive* jurisdiction over criminal and private civil matters involving Indian reservations within the particular state. *See* Pub. L. No. 91-523, § 2, 84 Stat. 1358 (1970).

II. *Claim that the IGRA Repealed sections 1955 and 1175*

Appellants Laughing and Burns contend that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and the provision that provides criminal penalties for violations of the IGRA, 18 U.S.C. § 1166, "preempted" 18 U.S.C. § 1955. We find this contention to be without merit.

The issue in this case is not whether the IGRA and 18 U.S.C. § 1166 preempted 18 U.S.C. § 1955, but whether the former two implicitly repealed the latter. With that in mind, " '[i]t is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible.' " *Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n.43 (1972) (quoting *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871)). Congressional intent to repeal may be demonstrated by the " 'positive repugnancy between the provisions' " of the statute. *United States v. Batchelder*, 442 U.S. 114, 122 (1979) (quoting *United States v. Borden Co.*, 308 U.S. 188, 199 (1939)). *See United States v. Jackson*, 805 F.2d 457, 460 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987). Moreover, " '[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the

contrary, to regard each as effective.' " *Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

The congressionally declared purpose of the IGRA is to promote tribal economic development and self-sufficiency in addition to shielding the tribes from the influences of organized crime through the enactment of a statutory scheme regulating the operation of gaming by Indian tribes. 25 U.S.C. § 2702(1), (2). To that end, the IGRA divides gaming into three classes, subjecting the classes to varying degrees of regulatory control.

Class I gaming, defined as ceremonial or traditional gaming, which includes social games for nominal prizes, remains within the exclusive control of the Indian tribe. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo, lotto, pull-tabs, tip jars, punch boards and card games that are either authorized or not specifically prohibited by state law, remains within the jurisdiction of the tribe but is subject to oversight by the National Indian Gaming Commission ("NIGC"). 25 U.S.C. §§ 2703(7)(A), 2710(a)(2), (b) and (c). Class II gaming is only permitted (1) if carried on in a state that allows such gaming for any purpose by any person, organization, or entity; (2) if not prohibited by federal law; and (3) if a tribal ordinance or resolution has been adopted permitting such gaming. 25 U.S.C. § 2710(b)(1)(A), (B), (b)(2) and (b)(4)(A). The IGRA expressly excludes from class II gaming slot machines of any kind. 25 U.S.C. § 2703(7)(B)(ii). Class III gaming, defined as all gaming not listed in either Class I or II, is prohibited unless (1) authorized by a tribal ordinance or resolution; (2) located in a state that permits the particular gaming for any purpose by any person, organization

or entity; and (3) conducted in accordance with a compact negotiated between the Indian tribe and the state. 25 U.S.C. §§ 2703(8), 2710(d)(1).

The statutory mechanism providing for the enforcement of the IGRA establishes exclusive federal jurisdiction over criminal prosecutions for violations of state laws made applicable to Indian lands, unless criminal jurisdiction has been transferred to the state. 18 U.S.C. § 1166.

> The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country.

18 U.S.C. § 1166(d). Section 1166(b) provides in relevant part:

> Whoever . . . is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed . . . within the jurisdiction of the State in which the act . . . occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act . . . shall be guilty of a like offense and subject to a like punishment.

Under the foregoing provisions, gambling activity that violates state licensing, regulatory, or prohibitory law is punishable even though it may not violate federal law. 18 U.S.C. § 1166(a). Similarly, 18 U.S.C. § 1955 prohibits gambling businesses that violate the law of the state in which they are conducted. *Id.* § 1955(b)(1)(i). Because the two provisions prohibit gambling conducted

in violation of state law and because of the comprehensive regulatory structure of the IGRA, appellants assert that 18 U.S.C. § 1955 did not survive the enactment of IGRA.

The fact that the two statutes provide criminal penalties for the same activity, however, is not determinative in this case. For a repeal by implication, the provisions of one must be repugnant to the other. This is not the case. While it is true that both provisions punish gambling operations that violate state law, the scope of section 1955 exceeds that of section 1166. Section 1955 prohibits not only gambling businesses in violation of state law but those enterprises that are conducted by more than five persons and that have operated continuously for more than thirty days or that produce revenues of $2,000 on any single day. 18 U.S.C. § 1955(b). That provision targets large-scale illegal gambling enterprises and imposes stringent penalties—a maximum fine of $20,000 and/or imprisonment for not more than five years and forfeiture of all property used in the illegal enterprise. *See United States v. Farris*, 624 F.2d 890, 896 (9th Cir. 1980) (identifies federal interest as eradication of large-scale gaming). It would be illogical to suppose that Congress now intends to punish extensive gambling businesses under state misdemeanor statutes, which are subsumed under section 1166(a), simply because they are conducted in Indian country. *See* N.Y. Penal Law §§ 225.05, 225.30 (McKinney 1989) (class A misdemeanors for both promotion of illegal gambling and possession of illegal gambling devices). We conclude therefore that the provisions do not demonstrate the mutual exclusivity necessary to impute to Congress the clear, affirmative intent to repeal.

Cook also maintains that 15 U.S.C. § 1175 was repealed by the IGRA. We need go no further than to refer Cook to 25 U.S.C. § 2710(d)(6), which expressly provides for the continuing application of 15 U.S.C. § 1175, except where gaming is conducted in accordance with a tribal-state compact that is in effect. A compact is in effect only when "notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B). Although the St. Regis tribe has entered into negotiations with New York State for the purpose of forming a compact, no compact has been agreed to and there has been no official approval of the compact. Therefore, the operation of slot machines by Cook falls squarely within the prohibited activity governed by section 1175.

III. *Claim that offenses do not violate New York law*

Even if 18 U.S.C. § 1955 was not impliedly repealed, Laughing and Burns contend that the government failed to prove an essential element of an offense under section 1955, namely that the operation of slot machines violated New York law. Appellants' argument that this essential element was not proved may succeed only if their gambling activity did not violate "the law of a State . . . in which it is conducted." 18 U.S.C. § 1955(b)(1)(i). Their position is that whether state law has been violated depends upon whether New York law is criminal/prohibitory or civil/regulatory. The prohibitory/regulatory distinction was developed to aid in the interpretation of Public Law 280, which granted certain states general criminal and civil (but not regulatory) jurisdiction over specified areas of Indian coun-

try.[1] *See Bryan v. Itasca County*, 426 U.S. 373, 380-81 (1976). The distinction was created to protect Indian sovereignty from interference by the states, precluding states from asserting civil regulatory powers over the Indian tribes. *United States v. Dakota*, 796 F.2d 186, 187-88 (6th Cir. 1986).

Appellants maintain that New York law is civil/regulatory because New York allows some gambling activity and possession of some gambling devices under certain circumstances, *see* N.Y. Gen. Mun. Law § 185 *et seq.* (McKinney 1986 & Supp. 1990) (local legislatures may license the operation of games of chance by authorized charitable organizations); N.Y. Penal Law § 225.32 (McKinney 1989) (antique slot machines not used for gambling purposes or machines assembled for purposes of being transported to a jurisdiction where such devices are lawfully operated are permitted), and therefore their activities did not violate the "law of a State . . . in which [they were] conducted." We are not persuaded by their contention. Although some gambling activity is permitted, New York flatly prohibits the operation of slot machines for gambling purposes. *State v. Snyder*, 141 Misc. 2d 444, 449, 532 N.Y.S.2d 827, 831 (County Ct. 1988) ("such conduct . . . is not permitted to any extent in this State"); N.Y. Penal Law § 225.30 (McKinney 1989).

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1 Public Law 280 is the commonly-used name of Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162) and 67 Stat. 589 (codified at 28 U.S.C. § 1360). The six states are Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin.

IV. *Grace Period*

Tarbell, Laughing and Burns further argue that even if the IGRA did not repeal section 1955 or section 1175, their activities fall within the one-year grace period provided by the IGRA. Section 2703(7)(D) provides:

> Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was *legally operated on Indian lands on or before May 1, 1988*, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

25 U.S.C. § 2703(7)(D) (emphasis supplied). Subparagraph (B)(ii) refers to "electronic or electromechanical facsimiles of any game of chance or slot machines." 25 U.S.C. § 2703(7)(B)(ii). The appellants argue that the statute provides a one-year grace period for the operation of slot machines, if the slot machines were legally operated on or before May 1, 1988 and if the tribe requests the state in which it is located to negotiate a compact no later than November 16, 1988. "Legally operated" means the device is operated in a state that permits such gaming for any purpose by any person or organization and such gaming is not specifically prohibited by federal law. 25 U.S.C. § 2710(b)(1)(A).

The legislative history demonstrates, however, that the grace period is intended to govern currently operated games such as video bingo, bingolet, bingo 21 and other

similar devices, which became Class III devices upon the enactment of the statute. S. Rep. No. 446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 3701, 3077, 3080. Through the application of the grace pe' d, the tribes operating such games could continue their operation so long as they request the state to enter into negotiations, thereby preventing a shutdown in operations where the games were not prohibited by federal law and were permitted under state law. Appellants' activities, however, violated both federal and state law.

The assertion that the grace period applies to slot machines makes little sense when the statutory requirements for legal operation are examined. The operation of slot machines is only lawful if carried on in a state that "permits such gaming for any purpose by any person, organization or entity . . . ." 25 U.S.C. § 2710(b)(1)(A). As has been established, slot machines for gambling purposes generally are prohibited by the laws of New York State. Legally operated also means that the device was not prohibited by federal law. 25 U.S.C. § 2710(b)(1)(A). But the slot machines operated by appellants were illegal under the statute punishing the use or possession of such devices in Indian country, 15 U.S.C. § 1175. To construe the statute as requested by appellants, would undermine the requirement that to conduct gambling of this sort, a compact must be in effect. 25 U.S.C. § 2710(d)(1)(C).

V. *Sufficiency of the evidence*

Cook was charged with the illegal possession of gambling devices in Indian country. 15 U.S.C. § 1175. Sec-

tion 1171 defines the term "gambling device" as follows:

> (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. § 1171(a)(1). Cook contends that the judge erred in denying his motion for acquittal because there was insufficient evidence to show that he operated a "slot machine." In particular, he complains that the slot machine introduced at trial, People's Exhibit 12, was never operated for the jury and thus the jury could not conclude that he was in possession of slot machines. Moreover, because the government failed to establish the presence of the requisite components—drum or reel with insignia, or that the device delivered money or property as a result of the application of an element of chance—and because the statute specifically mentions these component parts, Cook maintains that expert testimony should have been provided at the very least.

We reject Cook's contention. In challenging the sufficiency of the evidence, an appellant bears a "very heavy burden." *United States v. Torres*, 901 F.2d 205, 216 (2d Cir. 1990). A conviction must stand if "after viewing the evidence in the light most favorable to the prosecution" this court finds that "any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted).

Expert testimony is only admissible when such testimony is helpful to the trier of fact. Fed. R. Evid. 702. Such testimony is unnecessary where the jury is capable of comprehending the facts and drawing the correct conclusions from them. *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962). Indeed, the judge in his discretion may exclude expert testimony when it is not helpful to the jury. *United States v. Schatzle*, 901 F.2d 252, 257 (2d Cir. 1990).

Here, it cannot be said that the layperson would fail to recognize a slot machine without the introduction of expert testimony. The accessibility of major gambling arenas such as Las Vegas, Nevada and Atlantic City, New Jersey has brought home the reality of gambling, and in particular, slot machines. The recognition of an ordinary "one arm bandit" is well within the ability of the average person.

At trial, three officers testified about the slot machines at the Night Hawk Cafe. One officer recounted that before the police took the slot machines off the premises, Cook opened each with a key and removed money from within the cash boxes. The officer who was responsible for inventorying the contraband, revealed that there were 62 slot machines in all, exhibit 12 being one of the 62 seized by the police. Finally, although the slot machine was not operated for the jury on account of Cook's objection, it remained in the courtroom for the jury to view throughout the trial and went into the deliberation room as an exhibit. We find no error in the trial judge's decision to deny the motion

because the evidence was sufficient for a rational trier of fact to conclude that Cook operated slot machines.

VI. *Reduction for Acceptance of Responsibility*

Judge McCurn properly denied Laughing a reduction of sentence for acceptance of responsibility. The reduction was not withheld, as Laughing contends, because he entered a conditional plea and continued to challenge federal jurisdiction. Judge McCurn simply determined that Laughing never had indicated his acceptance of responsibility apart from the guilty plea. Indeed, at the sentencing, Laughing said: "I will go to my grave saying I did nothing wrong." This does not manifest the acceptance of factual guilt referred to in United States Sentencing Commission, Guidelines Manual ("U.S.S.G.") § 3E1.1 Application note 2. *See United States v. Royer*, 895 F.2d 28, 30 (1st Cir. 1990) ("acceptance of responsibility necessitates candor and authentic remorse"). Judge McCurn's determination has an adequate foundation and therefore cannot be disturbed. U.S.S.G. § 3E1.1 Application note 5; *see also United States v. Irabor*, 894 F.2d 554, 557 (2d Cir. 1990).

VII. *Other claims*

We have considered appellants' remaining contentions and find them to be without merit.

CONCLUSION

For the foregoing reasons, the judgments of the district court are affirmed.

LASKER, *District Judge*, dissenting:

I respectfully dissent.

It is my view that the evidence below was insufficient as a matter of law to establish that the St. Regis Mohawk tribe is a "dependent Indian community." In holding that there was "ample evidence" from which the district court properly could conclude that the St. Regis tribe is a dependent community, the majority cites *United States v. Sandoval*, 231 U.S. 28, 47-48 (1913). There are several reasons why I believe *Sandoval* does not justify the result reached here. First, the Supreme Court's opinion in *Sandoval*, because it preceded the enactment of 15 U.S.C. § 1175, is of limited value as a guide to the interpretation of the term "dependent Indian community" as that term is used in the statute.

Moreover, the definition of "dependent Indian community" offered by the *Sandoval* court is too vague to be useful. In holding that the judiciary should follow the lead of the executive and legislative branches with regard to whether a community is dependent, the court stated:

> [B]y an [sic] uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship cannot be said to be arbitrary but must be regarded as both authorized and controlling.

231 U.S. at 47. Accordingly, *Sandoval*, as cited by the majority, stands for the proposition that those Indian communities which the legislative and executive branches have treated, in a non-arbitrary way, as dependent communities should be treated by the courts as dependent communities. However, the *Sandoval* court does not provide guidelines as to what extent of government involvement is necessary to render a community "dependent." The involvement in tribal affairs demonstrated by the federal government in *Sandoval* is qualitatively different from the relationship between the federal government and the St. Regis tribe as reflected by the record in this case.

It also must be noted that the *Sandoval* court's reference to the "primitive customs and limited civilization" of the Pueblo in the passage quoted above is a sample of the outmoded assumptions about Native American peoples upon which the *Sandoval* opinion is based—though such assumptions may have been general at the time. The attitudes expressed in *Sandoval* cannot be regarded as mere dicta, but, as the quotation above demonstrates, are integral to the holding of the case.

Nor do the cases which have established and applied the standard for what constitutes a dependent Indian community under 15 U.S.C. § 1175 offer sufficient support for the result reached here. In *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971), the Court of Appeals merely describes the general nature of the evidence received by the trial court to determine whether the community in question was dependent without any specific reference to what that evidence demonstrated objectively. In *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988), the Court of

Appeals concluded that the factual record below was insufficient to reach a conclusion regarding dependency. *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986) involved a situation where the federal government actually retained title to the land upon which the tribe in question lived. In *United States v. Levesque*, 681 F.2d 75 (1st Cir. 1982), *cert. denied*, 459 U.S. 1089 (1982), the Court of Appeals based its finding of federal dependency on the fact that the tribe received $3 million per year in federal aid and no state aid. In the present case, the tribe itself owns the land upon which it resides and there has been no evidence with regard to how much funding is actually provided.

As the majority opinion correctly states, to determine whether a particular Indian tribe is a dependent community, it is necessary to examine (1) the nature of the area; (2) the relationship of the inhabitants in the area to the Indian tribes and the federal government; and (3) the established practice of government agencies toward that area.

The evidence in this case established that the area in question is inhabited by a federally recognized tribe of approximately 3,000 St. Regis Mohawk Indians. Dean White, a representative of the Bureau of Indian Affairs (the "BIA") testified that, "We provide service programs to the tribes. We provide funding for contracts to them, for various socio-economic programs that they run. . . . We provide funding for education programs, housing programs, training programs, Social Services programs and administration of tribal government programs." He also stated that the BIA guarantees loans to the tribe and individual tribe members through banks

and that the BIA is involved in planning and funding roads on the reservation.

However, this evidence does not by itself establish that the St. Regis tribe is a dependent community. The mere existence of federal programs which benefit a given community does not establish that that community's relationship with the federal government can be characterized as one of dependency. In ordinary English usage, "dependent" means "relying on another for support" or "lacking the necessary means of support and receiving aid from others." *See, e.g.*, Webster's Ninth New Collegiate Dictionary (1985); Webster's Third New International Dictionary Unabridged (1963). In order to determine whether the St. Regis tribe relies on the federal government for support, it would seem to be necessary to ascertain at the very least what percentage of the tribe's expenses federal funding covers and how many and what percentage of tribe members actually participate in or benefit from federal programs.

It is particularly important that the evidence with regard to whether the St. Regis tribe is a dependent community be solid given the dramatic difference between the penalties under 15 U.S.C. § 1175 for committing the offenses in question in "Indian country" and the penalties for the same conduct anywhere else in New York state. Although 15 U.S.C. § 1175 is nondiscriminatory on its face because it applies to persons of all races who commit such offenses in Indian country, the statute has the potential to have a racially discriminatory impact because those most likely to be prosecuted for committing offenses in Indian country are Native Americans. Accordingly, I would reverse and

remand for further evidence on the issue of whether the St. Regis tribe is a dependent Indian community.

I also dissent from the majority's decision to affirm the district court's refusal to grant Laughing, who pled guilty, a réduction in sentence under the Sentencing Guidelines for acceptance of responsibility. Section 3E1.1 of the Sentencing Guidelines states that a defendant is entitled to credit for acceptance of responsibility "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct . . . ." It is true, as the majority points out, that Laughing did state "I will go to my grave saying I did nothing wrong." However, Laughing also stated that

> I take full responsibility as running the place. I never denied the fact that I am the owner of [the casino]. I believe that what may be against the law in New York State is not necessarily against the law on the reservation. We are a sovereign nation, whether [the Assistant United States Attorney] wants to believe it or not.

In light of that statement, I construe the defendant's statement that he did not believe that he had done anything wrong only as disagreeing with the law as he now understood it, but not failing to accept personal responsibility for his criminal conduct. Accordingly, he is entitled to a reduction for acceptance of responsibility and I would reverse and remand so that he might be resentenced.

Appendix B—Opinion of the United States District Court for the Northern District of New York, Dated November 15, 1989.

UNITED STATES OF AMERICA,

v.

JAMES BURNS,

Defendant.

UNITED STATES OF AMERICA,

v.

RODERICK COOK,

Defendant.

UNITED STATES OF AMERICA,

v.

RUDOLPH HART and RENEE HART,

Defendants.

UNITED STATES OF AMERICA,

v.

ANTHONY LAUGHING and GERALD LAUGHING,

Defendants.

UNITED STATES OF AMERICA,

v.

DAVID MAINVILLE,

Defendant.

UNITED STATES OF AMERICA,

v.

WILLIAM SEARS,

Defendant.

UNITED STATES OF AMERICA,

v.

ELI TARBELL,

Defendant.

UNITED STATES OF AMERICA,

v.

PAUL TATLOCK and TAREK TATLOCK, a/k/a Paul Tatlock, Jr.,

Defendants.

Nos. 89-CR-146 to 89-CR-151, 89-CR-153 and 89-CR-154.

UNITED STATES DISTRICT COURT,

N.D. NEW YORK.

NOV 15, 1989.

On motions of defendants charged with conducting illegal gambling business, possession of gambling devices within Indian territory, or knowingly advancing or profiting from unlawful gambling activity within Indian country, the District Court, McCurn, Chief Judge, held that: (1) state and federal courts had concurrent criminal jurisdiction; (2) Indian Gaming Regulatory Act did not preempt federal gambling statutes existing before Act's enactment; (3) state offenses referred to in indictment could serve as basis for federal charge of engaging in illegal gambling business; (4) federal gambling statute dealing with possession of gambling devices within Indian country did not violate equal protection; and (5) reservation in question was "Indian country" for purpose of federal gambling statute.

Ordered accordingly.

Frederick J. Scullin, Jr., U.S. Atty., Syracuse, N.Y., for U.S.; John Brunetti, Asst. U.S. Atty., of counsel.

Vaughn Aldrich, Hogansburg, N.Y., for defendants Paul Tatlock, Mainville, Sears, Cook and James Burns.

John Piasecki, Malone, N.Y., for defendant Paul Tatlock, Jr. a/k/a Tarek Tatlock.

Emil M. Rosi, Syracuse, N.Y., for defendants Tarbell, Rudolph and Renee Hart, and Anthony Laughing; Michael J. Vavonese, of counsel.

Wiles & Fahey, Syracuse, N.Y., for defendant Renee Hart; Joseph E. Fahey, of counsel.

Domina Gerrard Copple & Stratton, Omaha, Neb., for defendant Gerald Laughing; John Peebles, of counsel.

MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

Introduction

All of the defendants in these criminal matters have been indicted on federal charges of either conducting an illegal gambling business, 18 U.S.C. § 1955, the unlawful use and possession of gambling devices within Indian territory, 15 U.S.C. §§ 1175 and 1176, or knowingly advancing or profiting from unlawful gambling activity within Indian country, 18 U.S.C. § 1166(b). Various other charges have been asserted against a number of the defendants arising out of the efforts of the State Police to arrest certain defendants or seize property pursuant to warrants. This memorandum-decision addresses some of defendants' pre-trial motions to dismiss the indictment which, though denied by this court in a bench decision on November 6, 1989, warrant further elaboration. These motions will be discussed in turn.

The Indictments

(1) 89-CR-148. *William John Sears* has been separately indicted for one count of knowingly possessing and using gambling devices consisting of slot machines within Indian country on or about December 16, 1987, in violation of 15 U.S.C. §§ 1175 and 1176.

(2) 89-CR-149. *Roderick Alex Cook* has been separately indicted for one count of knowingly possessing and using gambling devices consisting of slot machines within Indian country on or about December 16, 1987, in violation of 15 U.S.C. §§ 1175 and 1176.

(3) 89-CR-150. *Paul A. Tatlock and Paul ("Tarek") Tatlock* have been indicted together. There are five counts in the superseding indictment only four of which assert claims against Paul ("Tarek") Tatlock Jr. *Count I* asserts that Paul A. Tatlock possessed and used gambling devices consisting of slot machines within Indian country on or about December 16, 1987, in violation of 15 U.S.C. §§ 1175 and 1176. *Count II* asserts both Paul A. Tatlock and Paul ("Tarek") Tatlock Jr. acting in concert together violated 15 U.S.C. §§ 1175 and 1176 by unlawfully using and possessing slot machines within Indian country on June 7, 1989. *Count III* charges both defendants with the operation of an illegal gambling business from April 10th to July 20, of 1989, in violation of 18 U.S.C. § 1955(a); it is asserted that the gambling operation was prohibited by New York Penal Law §§ 225.05 and 225.30(1)(2)(3)—a necessary element of a § 1955 claim. *Count IV* asserts that both Tatlock defendants acted in concert on July 7, 1989, to knowingly profit from the operation of black jack tables within Indian country in violation of 18 U.S.C. § 1166(b) as well as New York Penal Law § 225.05. *Count V* charges the Tatlocks with acting in concert to unlawfully use and possess slot machines within Indian country on July 7, 1989, in violation of 15 U.S.C. §§ 1175 and 1176.

(4) 89-CR-153. *David Mainville* has had a superseding indictment issued against him which alleges three independent counts. *Count I* alleges that Mainville owned and operated an illegal gambling business from on or about June 6th to July 20th of 1989, in violation of 18 U.S.C. § 1955(a); this count of the indictment asserts that Mainville's gambling operation was prohibited by New York Penal Law §§ 225.05 and 225.30(1)-(3). *Count II* alleges that Mainville did knowingly advance or profit from unlawful gambling activity within Indian country on July 7, 1989, in violation of 18 U.S.C. § 1166(b) as well as New York Penal Law § 225.05. *Count III* alleges that on or about

July 7, 1989, Mainville unlawfully used and possessed slot machines within Indian country in violation of 15 U.S.C. §§ 1175 and 1176.

(5) 89-CR-147. *James Joseph Burns* has been indicted on one count of knowingly using and possessing slot machines within Indian country on December 16, 1987, in violation of 15 U.S.C. §§ 1175 and 1176.

(6) 89-CR-146. *Anthony Laughing* and *Gerald Laughing* have been indicted together. There are nine counts in the superseding indictment, three of which assert claims against both defendants. *Count I* charges Anthony Laughing with use and possession of gambling devices consisting of slot machines within Indian country on or about June 6, 1989, in violation of 15 U.S.C. §§ 1175 and 1176. *Count II* charges Anthony and Gerald Laughing with the operation of an illegal gambling business from December 27, 1988 to July 20, 1989, in violation of 18 U.S.C. § 1955; it is asserted that the gambling operation was prohibited by New York Penal Law Sections 225.05 and 225.30(1)(2) and (3)—a necessary element of a Section 1955 claim. *Count III* asserts that Anthony and Gerald Laughing, acting in concert, knowingly profited from unlawful gambling activity consisting of the operation of black jack and dice tables on or about July 8, 1989, in violation of 18 U.S.C. § 1166(b) and 18 U.S.C. § 2, and New York Penal Law Section 225.05. *Count IV* charges Anthony and Gerald Laughing with use and possession of gambling devices consisting of slot machines within Indian country on or about July 8, 1989, in violation of 15 U.S.C. §§ 1175 and 1176. *Count V* asserts that Anthony Laughing removed merchandise to prevent the seizure of said merchandise on or about July 20, 1989, in violation of 18 U.S.C. § 2232(a). *Count VI* charges that Anthony Laughing knowingly conducted an illegal gambling business from August 19, 1989 to September 21, 1989, in violation of 18 U.S.C. § 1955 and New York Penal Law Sections 225.05

and 225.30(1)(2) and (3). *Count VII* charges Anthony Laughing with use and possession of gambling devices consisting of slot machines within Indian country on or about August 21, 1989, in violation of 15 U.S.C. § 1175 and 1176. *Count VIII* asserts that Anthony Laughing knowingly advanced or profited from unlawful gambling activity on August 21, 1989, in violation of 18 U.S.C. § 1166(b) and 18 U.S.C. § 2, and New York Penal Law Section 225.05. *Count IX* charges Anthony Laughing with forcibly resisting and interfering with officers of the New York State Police acting in cooperation with special agents of the FBI in executing an arrest warrant, in violation of 18 U.S.C. § 111 (a)(1) and 18 U.S.C. § 114.

(7) 89-CR-151. *Eli Tarbell* has been indicted on three separate counts of use and possession of gambling devices consisting of slot machines within Indian country on December 16, 1987, September 14, 1988, and June 6, 1989, in violation of 15 U.S.C. §§ 1175 and 1176.

(8) 89-CR-154. *Rudolph and Renee Hart* are indicted together. *Count I* of the superseding indictment charges that Harts with conducting an illegal gambling business from February 24, 1989 to July 20, 1989, in violation of 18 U.S.C. §§ 1955(a) and New York Penal Law Sections 225.05 and 225.30(1)(2) and (3). *Count II* asserts that the Harts knowingly advanced and profited from unlawful gambling activity within Indian country on July 7, 1989, in violation of 18 U.S.C. § 1166(a) and 18 U.S.C. § 2, and New York Penal Law Section 225.05. *Count III* charges the Harts with use and possession of gambling devices consisting of slot machines within Indian country on July 7, 1989, in violation of 15 U.S.C. §§ 1175 and 1176.

Discussion

I. Subject Matter Jurisdiction

The fundamental question raised by defendants' motions is whether state and/or federal jurisdiction exists over the

subject matter contained in the indictments. The court concludes that the state and federal courts have concurrent criminal jurisdiction over the matters at hand.

Defendants challenge the subject matter jurisdiction of this court over the charges brought. Defendants maintain that the reservation is a sovereign territory, the jurisdiction over which is governed by treaties with the United States. They cite the Treaty of Fort Harmar of 1789, entered into by the United States and the Six Nations of the Iroquois confederacy.[1] According to the defendants, the Iroquois ceded jurisdiction only over robbery and murder to the United States, and in five subsequent treaties with the United States, made no further grant of any authority over the Indian nations either to the United States or the State of New York.

In addition, defendants seem to contend that the federal court lacks jurisdiction over any crime not enumerated in 18 U.S.C. § 1153(a). Federal jurisdiction over these crimes is contained in 18 U.S.C. § 1152.

Defendants also claim that Congress has ceded *exclusive* criminal jurisdiction over Indian country in the State of New York to the state, pursuant to 25 U.S.C. § 232, thus divesting the United States of jurisdiction over the charges.

[1] It should be noted at the outset that the sovereignty retained by native American tribes is limited. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978). It may be divested by federal law or when inconsistent with the overriding interests of the federal government. *Washington v. Confederated Tribes*, 447 U.S. 134, 152-53 100 S.Ct., 2069, 2081-81, 65 L.Ed.2d 10

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[1]Counsel for the government notes that representatives of the Mohawk tribe, of which defendants are members, were absent when the treaty was signed, and therefore they are not signators to the agreement. Considering the development of law regarding treaties with Indian nations, *infra*, the importance of this treaty is not material to the question of jurisdiction.

(1980). In sum, while the notion of tribal sovereignty is often given lip service, the Indian tribes enjoy only that sovereignty which Congress is willing to tolerate:

> The sovereignty that Indian Tribes retain is of a unique and limited character. It only exists at the sufferance of Congress and is subject to complete defeasance. *Wheeler,* 435 U.S. at 323, 98 S.Ct. at 1086.

[2] Quite frankly, the Supreme Court as acknowledged that Congress may, on its own, abrogate or modify treaties with Indian nations. *Lone Wolf v. Hitchcock,* 187 U.S. 553, 566, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903). Moreover, Congress may pass a general jurisdictional law which would apply to Indian country even though it has not specified which treaties were modified or abrogated in the wake of the law passed. *Washington v. Yakima Indian Nation,* 439 U.S. 463, 478 n. 22, 99 S.Ct. 740, 750 n. 22, 58 L.Ed.2d 740 (1979).

[3] Consequently, the authority over Indian lands possessed by the Indian nations, the United States, and the individual states is determined by acts of Congress. Only those matters not covered by federal statute may still be governed by treaty. Since the charges involved in the present case are the subjects of the federal statutes in question, any treaty provisions are superseded by those statutes. Thus, we may confine our analysis to interpretation of the statutes.

[4] Defendants argue that the Major Crimes Act, 18 U.S.C. §§ 1152[2] and 1153,[3] enumerates the only crimes over which the United States has jurisdiction in Indian country. However, numerous courts have held that Section 1152 does not apply to federal crimes of "general applicability," but only to federal enclave statutes. As explained in *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983):

> 18 U.S.C. 1152 *is not a predicate for general federal criminal jurisdiction in Indian country.* Rather the scope of section 1152 is limited to the applicability or nonapplicability of federal enclave laws, those laws passed by the federal government in exercise of its police powers over federal property and now defined in the United States Code in terms of "special maritime and territorial jurisdiction of the United States," 18 U.S.C. 7.

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[2]Title 18 U.S.C. § 1152 reads:

> Except as otherwise provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

[3]Title 18 U.S.C. § 1153 reads, in pertinent part:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Id. at 385 (emphasis added). In other words, 18 U.S.C. § 1152 is not the vehicle through which generally applicable criminal statutes are applied to Indian reservations. These statutes, including 15 U.S.C. § 1175, 18 U.S.C. § 1955, and 18 U.S.C. § 1166, apply of their own accord.

[5] Defendants also argue that Congress, through 25 U.S.C. § 232,[4] has ceded *exclusive* general criminal jurisdiction to the State of New York. There is no federal court decision which squarely addresses the issue of whether the statute gives *exclusive* criminal jurisdiction to the courts of New York, Defendants' argument is arguably supported, however, by some state court decisions and dicta in some federal court decisions.

In *People v. Boots,* 106 Misc.2d 522, 434 N.Y.S.2d 850 (Sup.Ct. Franklin County 1980), the court held, after review of the legislative history of the statute, "that 25 U.S.C. section 232 was and is a valid surrender of federal criminal jurisdiction over Indians within the borders of New York State." *Boots,* 106 Misc.2d at 525, 434 N.Y.S.2d at 853. In *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 679, 94 S.Ct. 772, 783, 39 L.Ed.2d 73 (1974), the court stated:

> We are also aware that New York and federal authorities eventually reached partial agreement in 1948 when criminal jurisdiction over New York Indian reservations was ceded to the State. 62 Stat. 1224, 25 U.S.C. § 232.

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[4]Title 25 U.S.C. § 232 reads, in pertinent part:

> The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian Reservations within the State of New York to the same extent as the Courts of the State have jurisdiction over offenses committed elsewhere within the state. . . .

See also *United States v. Devoian Gas and Oil Co.*, 424 F.2d 464, 468 (2d Cir. 1970) ("25 U.S.C. 232 and 233 relinquished the criminal and civil jurisdiction of the United States over New York Indians"); *cf. People v. Edwards*, 78 A.D.2d 582, 432 N.Y.S.2d 567 (4th Dept. 1980) (holding that New York has jurisdiction to try an Indian who is charged with murdering another Indian on a New York Indian reservation, but not stating that New York had *exclusive* jurisdiction).

However, since neither state court decisions nor dicta are controlling this court will consider the question *de novo*.

Prefatorily, it is a cardinal rule of statutory construction that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). There are two phrases in the language of 25 U.S.C. § 232 which lead to the conclusion that the statute confers jurisdiction on the State of New York, but that the grant is not exclusive. Noticeably absent from the phrase "[t]he State of New York shall have jurisdiction over offenses . . ." is an adjective, such as "exclusive," "complete," or "sole," modifying jurisdiction.

The statute also provides that the state shall have jurisdiction "to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State. . . ." The meaning of this phrase on its face is that the extent of the grant of criminal jurisdiction is that the laws of the state apply in Indian country just as they do in any other part of the state. That reading certainly does not preclude federal jurisdiction.

Furthermore, an additional maxim of statutory construction is that "repeals by implication are not favored." *Randall v. Loftsgaarden*, 478 U.S. 647, 661, 106 S.Ct. 3143, 3151, 92 L.Ed.2d 525 (1986). Thus, absent a clear statement from Congress that it granted exclusive jurisdiction to

the state, any repeal of federal criminal jurisdiction over statutes of general applicability would be by implication.

II. Title 18 U.S.C. § 1955

Defendants move to dismiss the counts under 18 U.S.C. § 1955[5] on the alternate grounds that: (1) 18 U.S.C. § 1955 has been preempted as it relates to prosecutions occurring on "Indian country" by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, and (2) that a necessary element of the statute, namely that there has been a violation of an underlying state gambling law, has not been set forth in the indictment.

A. Preemption of 18 U.S.C. § 1955

[6] Defendants contend that Title 18 U.S.C. § 1955 has been preempted by the enactment of the Indian Gaming

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[5]18 U.S.C. § 1955 entitled "Prohibition of illegal gambling businesses" states in applicable part:

(a) Whoever conducts, Finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) *is a violation of the law of the State or political subdivision in which it is conducted;*

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States. . . .

Regulatory Act, Title 25 U.S.C. § 2701 *et seq.* ("IGRA"), particularly by the amendment of the federal criminal code under the IGRA at 18 U.S.C. § 1166.

The IGRA was enacted, effective October 17, 1988, to establish a federal regulatory system for gaming on Indian lands. The congressionally stated purposes for the Act are (1) to provide a statutory basis for the operation of gaming by Indian tribes to promote tribal economic development, self-sufficiency, and strong tribal government; (2) to provide a statutory basis for the regulation of gaming by Indian tribes adequate to guard against organized crime influences, and to ensure that the tribes are the primary beneficiaries of the gaming; and (3) to establish independent federal regulatory authority and federal standards for gaming on Indian lands. 25 U.S.C. § 2702.

Toward these ends, gaming is broken down into three categories under the Act. Class I gaming is social games for prizes of minimal value or traditional forms of Indian gaming engaged in as part of tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class II gaming is bingo and similar games including "pull-tabs, lotto, punch boards, tip jars and instant bingo" and certain card games that are explicitly authorized by the state or not explicitly prohibited by the state. 25 U.S.C. § 2703(7)(A). Class III gaming is all other types of gaming not listed in Class I or Class II, including "banking card games" such as blackjack, slot machines, and other casino-type gambling. 25 U.S.C. § 2703(7)(B).

The Indian tribes are granted exclusive jurisdiction over Class I gaming. 25 U.S.C. § 2710(a)(1). The Indian tribes also have jurisdiction over Class II gaming, although the IGRA grants the Indian Gaming Commission, a federal entity, the power to regulate Class II gaming. 25 U.S.C. § 2710(a)(2) and (b)(1). Class III gaming is permissible only if it is (1) authorized by a tribal ordinance or resolution; (2) located in a state that permits such type of gaming for any

purpose by any person, organization or entity; and (3) conducted in accordance with a compact negotiated between the Indian tribe and the state. 25 U.S.C. § 2710(d)(1).

Criminal penalties for illegal gaming in Indian country are codified at 18 U.S.C. §§ 1166-68. Section 1166[6] provides, *inter alia,* that acts involving gambling in Indian country, "although not made punishable by any enactment of Congress," are nevertheless punishable if they violate

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[6]Title 18 U.S.C. § 1166, titled "Gambling in Indian Country," reads:

> (a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.
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> (c) For the purpose of this section, the term "gambling" does not include—
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> (1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or
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> (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.
>
> (d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

state licensing, regulatory or prohibitory gambling laws. 18 U.S.C. § 1166(b).

A violation of state law also is one element of a violation of 18 U.S.C. § 1955. Defendants maintain that both statutes are "assimilative" in nature, making a violation of state law punishable under federal gambling statutes. Thus, defendants urge, 18 U.S.C. § 1166, enacted as part of the new IGRA, preempts 18 U.S.C. § 1955. Defendants further argue that the language of the IGRA and the legislative history of the Act indicate it was intended to preempt all federal criminal statutes involving gambling except for 15 U.S.C. § 1175, which prohibits the use of specified gambling devices on Indian lands.[7] All other prosecutions for violations of gambling laws on Indian lands must now be brought pursuant to 18 U.S.C. § 1166, defendants maintain. It is the opinion of the court that the IGRA does not preempt 18 U.S.C. § 1955 or other federal gambling statutes existing before the enactment of the IGRA. Therefore, the motions to dismiss the counts of the indictments which allege violations of 18 U.S.C. § 1955 on these grounds are denied.

Regarding defendants' first argument, that Sections 1166 and 1955 both make violations of state law federal offenses and thus Section 1166 must preempt Section 1955, the court finds that, to the contrary, the statutes have distinctly

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[7]Title 15 U.S.C. § 1175 reads:

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18. The term "gambling device" is defined in 15 U.S.C. § 1171. Gambling devices are (1) slot machines or other similar devices; (2) other machines or mechanical devices, such as roulette wheels, designed and manufactured primarily for use in connection with gambling; and (3) subassemblies or essential parts of such machines.

different objectives. Section 1166 makes punishable a violation of state gambling law in Indian country that is not otherwise punishable under a federal statute. Section 1955, titled "Prohibition of Illegal Gambling Businesses," requires not only that the business violate state law, but that it involve five or more persons, and remain in substantially continuous operation or have daily revenue in excess of $2,000. It is clear that 18 U.S.C. § 1955 is a special statute that targets large gambling operations for federal prosecution. The goals of 18 U.S.C. §§ 1166 and 1955 are distinct, and the argument that one must preempt the other on the basis of their similarity must fail.

Defendants' arguments that the text of the IGRA and its legislative history indicate that it is intended to preempt other federal gambling statutes as they relate to Indian country are not compelling.

Defendants note initially a passage from the Senate Report which states that the IGRA was intended to "expressly preempt the field in the governance of gaming activities on Indian lands." Senate Report No. 100-446, 1988 U.S.Code Cong. & Admin. News 3071, 3076. While this statement seems supportive of defendants' position on its face, it must be read in context with the statement that follows it in the Senate Report: "Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." *Id.* Thus, the Senate apparently intended that interrelation of federal, state and tribal laws would be governed by the Act, and not by previously employed methods, including the "prohibitory/regulatory" test addressed *infra.* This evidences no intention to eradicate existing federal or state laws governing gambling.

Defendants also point to the language in 25 U.S.C. § 2710(b)(1), which states, in pertinent part:

> An Indian tribe may engage in, or license or regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—
>
> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is *not otherwise specifically prohibited on Indian lands by Federal law*). . . . (emphasis added).
>
> The Senate Report notes that the phrase:
>
> "not otherwise prohibited by Federal law" refers to gambling that utilizes mechanical devices as defined in 15 U.S.C. 1175. That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, *no other Federal statute*, such as those listed below [including 18 U.S.C. § 1955], *will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands.*

Senate Report, 1988 U.S.Code Cong. & Admin. News at 3082 (emphasis added).

The importance of this statement is its indication that Congress intended that no federal statute should prohibit the use of gambling devices for *bingo or lotto*, which are legal class II games under the IGRA. Thus, the IGRA makes 15 U.S.C. § 1175, and other statutes, including 18 U.S.C. § 1955, inapplicable to *class II bingo and lotto gaming*. This statement of Congress' intention indicates not that 18 U.S.C. § 1955 is to be preempted by the IGRA, but in fact that it is to remain in effect, except for its potential application to class II gaming.

B. *Failure to State a Necessary Element*

[7] 18 U.S.C. § 1955 prohibits persons from engaging in an "illegal gambling business" which involves five or more persons and is in continuous operation for over thirty days or has a gross revenue of $2,000 in any single day. An element of the federal crime is that the gambling activity must be in "violation of the law of the state . . . in which it is conducted." 18 U.S.C. § 1955(b)(1)(ii). Defendants assert that the indictment, which alleges that the defendants violated N.Y. Penal Law §§ 225.05,[8] and 225.30(1)(2) and (3),[9] does not allege a violation of a state statute which is sufficient to serve as an element of the federal offense.

The complex argument put forward by the defendants is as follows: (1) New York State's authority to regulate activities by Indians within Indian country is limited to that authority which has been expressly so provided by Congress, (2) the Congressional grants of authority to the State of New York do not permit the State of New York to govern activity which is described as "civil/regulatory" in nature

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[8]New York Penal Law § 225.05 "Promoting gambling in the second degree" states:

A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity.

Promoting gambling in the second degree is a class A misdemeanor.

[9]New York Penal Law § 225.30 "Possession of a gambling device" states:

A person is guilty of possession of a gambling device when, with knowledge of the character thereof, he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:

1. A slot machine; or

2. Any other gambling device, believing that the same is to be used in the advancement of unlawful gambling activity.

3. A coin operated gambling device with intent to use such device in the advancement of unlawful gambling activity.

Possession of a gambling device is a class A misdemeanor.

on Indian reservations, (3) N.Y. Penal Law §§ 225.05 and 225.30 is civil/regulatory, as opposed to criminal/prohibitory, in nature, (4) violation of this civil/regulatory statute cannot serve as an element of 18 U.S.C. § 1955, and (5) the indictment as it relates to charges asserted pursuant to 18 U.S.C. § 1955 must be dismissed for failure to allege a necessary element.

The defendants are correct in their assertion that Indian tribes retain "attributes of sovereignty" which are subject to defeasance only by an enactment of the Federal Government and not the States. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). "It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244 (1987).

[8] New York has been granted broad criminal jurisdiction by Congress over offenses committed by or against Indians on Indian country within the State. *See* 25 U.S.C. § 232.[10] However, the federal grant of civil jurisdiction was more circumscribed. 25 U.S.C. § 233 provides New York with jurisdiction over private civil litigation but does not appear to grant general civil regulatory authority to the State: reserving such authority to the federal government and to the Indians themselves. The grant of civil and criminal authority to New York in 25 U.S.C. §§ 232 and 233 is very similar that which was granted to a number of western states in Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360. The Supreme Court has determined that Public Law

[10] 25 U.S.C. § 232 states in applicable part: The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State. . . .

280 does *not* constitute a grant of general regulatory authority to the states to which it applies. See *Bryan v. Itasca County,* 426 U.S. 373, 385, 388-90, 96 S.Ct. 2102, 2109, 2110-11, 48 L.Ed.2d 710 (1976); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 1088, 94 L.Ed.2d 244 (1987). And, due to the similarities between the statutes, the same is true with respect to the grant of civil jurisdiction found in 25 U.S.C. § 233. See *People v. Snyder,* 141 Misc.2d 444, 532 N.Y.S.2d 827, 830-31 (Co.Ct.1988).

As a result of the limited grant civil regulatory authority embodied in Pub.L. 280, the Supreme Court, when analyzing whether a State may enforce an ordinance against Indians for actions which occur on Indian reservations, has embraced what has generally been termed a "criminal/prohibitory" vs. "civil/regulatory" mode of analysis. Under this analytical framework:

> if the intent of state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

California v. Cabazon Band of Mission Indians, 107 S.Ct. at 1088. In *Cabazon* the Court held that the State of California could not prosecute Indians for the operation of tribal sponsored bingo and card gaming on Indian reservations because California's laws with respect to gambling were civil/regulatory in nature. In making the determination, that California regulates rather than prohibits gambling, the Court noted that the state operated a lottery, permitted

horse-race betting, and allowed bingo and other card games to be played widely. *Id.* at 1089.

The defendants assert that New York Penal Law § 225.05 and 225.30 is civil/regulatory in nature and therefore cannot be used as an element of the *federal* crime. The Supreme Court in *Cabazon* expressly declined to decide whether State laws which are incorporated as an element of a federal crime are subject to the same civil/regulatory—criminal/prohibitory analysis, 107 S.Ct. at 1091. The Ninth Circuit has held that such an analysis applies to 18 U.S.C. § 1955, *Cabazon Band v. County of Riverside*, 783 F.2d 900, 903 (9th Cir.1986) *aff'd on other grounds* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), while the Sixth Circuit has rejected this view. *See United States v. Dakota*, 796 F.2d 186, 188-89 (6th Cir. 1986). The analysis presented by the Sixth Circuit appears to be more compelling. However, assuming *arguendo* that the civil/regulatory—criminal/prohibitory analysis applies, this court still holds that the violations of New York Law alleged in the indictment present conduct which is criminal in nature.

It is true, as defendants assert, that New York permits horse-race betting, sponsors a lottery, permits bingo, and allows certain organizations to operate "casino nights" as part of their fund raising activities. Defendants argue that since New York permits the use of games of chance in this manner, it only regulates gambling as opposed to criminally prohibiting such activities. However, New York Law as well as New York public policy strongly discourages the type of commercialized gambling activity for individual profit which is alleged in the indictment. The gaming activity is alleged to have involved the use and possession of slot machines—a device whose use is flatly prohibited in New York and whose possession is allowed only if an antique or assembled in state for out of state sale. *See* N.Y.

Penal Law §§ 225.30 and 225.32. Moreover, the prohibitions contained in N.Y. Penal Law §§ 225.05 and 225.30 are listed in the *penal* law; violation of these statutes being a Class A misdemeanor punishable by up to one year in prison. New York's General Municipal law § 185 *et seq.*, while allowing "casino night" fund raising, does so only where all the proceeds go to the benefit and use of charitable causes. Gen.Mun.L. § 189 places strict limits, at low dollar amounts, on the amount of any prize or pot, as well as any individual bet; regulates who may sponsor such events; regulates who may provide the gaming devices; limits to five the number of different games which may be conducted; prohibits any person from being paid for operating or managing any of the games, and makes the unauthorized conduct of any game of chance, even by a charitable organization, punishable as a misdemeanor.

Finally, the allegations against the defendants charged under 18 U.S.C. § 1955 portray extensive and on-going high stake gambling enterprises for individual rather than tribal profit. As such, this conduct falls more properly within the "criminal/prohibitory" side of New York law and public policy. *See People v. Snyder,* 141 Misc.2d 444, 532 N.Y.S.2d 827, 831-32 (Co. Ct.1988), *see eg., United States v. Farris,* 624 F.2d 890 (9th Cir.1980) (a gambling enterprise operated by individual Indians which involved blackjack, poker, and dice, gaming violated public policy of State of Washington and thus United States could enforce 18 U.S.C. § 1955 against Indians). Therefore, this court concludes that New York Penal Law §§ 225.05 and 225.30 is an appropriate element of an indictment pursuant to 18 U.S.C. § 1955.

Accordingly, having determined 18 U.S.C. § 1955 not preempted by 25 U.S.C. § 2701 *et seq.* and that the indictments set forth the necessary elements therein, the defendants' motion to dismiss relative thereto is denied.

III. Constitutionality of 15 U.S.C. §§ 1175 and 1176

[9] Defendants contend that 15 U.S.C. §§ 1175 and 1176 are based upon impermissible race classifications, and thus violate the Equal Protection Clause contained in the Fifth Amendment. This argument can be quickly dismissed.

Section 1175 makes it unlawful to use or possess "any gambling device in the District of Columbia, in any possession of the United States, *within Indian country* . . . or within the special maritime or territorial jurisdiction of the United States . . ." (emphasis added). Section 1176 merely enumerates the penalties for a violation of Section 1175.

Section 1175 is not based upon impermissible race classifications. It makes it unlawful for *anyone,* including Indians, to use or possess gambling devices, in any of the specified jurisdictions, including Indian country. There is no basis for an equal protection claim when Indians are subjected to the same body of law as any other individual, Indian or non-Indian, for a crime committed in Indian country. *Keeble v. United States,* 412 U.S. 205, 93 S.Ct. 1993, 1997, 36 L.Ed.2d 844 (1973); *United States v. Antelope,* 430 U.S. 641, 97 S.Ct. 1395, 1399, 51 L.Ed.2d 701 (1977).

Moreover, it is well-settled that federal legislation with respect to Indian tribes, although it may relate to Indians as such, is not based upon impermissible racial classifications. Rather, it is permissible governance of "once-sovereign political communities." *Antelope,* 97 S.Ct. at 1399.

Thus, the motion to dismiss the counts of the indictments charging violations of 15 U.S.C. §§ 1175 and 1176 on this ground must be denied.

IV. Constitutionality of IGRA

The defendants raised a number of constitutional objections to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* at oral argument. This court has considered the arguments of counsel and find them to be without merit as applied to the facts of these criminal prosecutions. Defendants assert that certain portions of the IGRA violate the Constitutional Separation of Powers doctrine. Another section of the IGRA is attacked on the basis that it violates the Equal Protection Clause in that it treats some Indian Tribes differently than others. However, these provisions are not at issue here and, therefore, the constitutional questions are not ripe for adjudication. In any event, the IGRA contains a savings provision, codified at 25 U.S.C. § 2721, which provides that "[i]n the event that any section or provision of this chapter, or amendment, made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect." Even if this court found these sections to be constitutionally invalid the remaining provisions would stand.

[10] Defendants also assert that the language of the IGRA with respect to "lotto" or "lotteries" is so vague as to violate the Due Process Clause. This vagueness assertedly fails to place the defendants on notice of the potential for criminal liability. The allegations of the indictment go well beyond the assertion that the defendants engaged in "lotto" type gaming and in many instances do not assert that "lotto" gaming was involved. Therefore, any slight vagueness which may exist in this statute is insufficient to cause the entire indictment to be dismissed. Defendants' motion in this respect is denied.

[11] Defendants also raise the question of whether the State of New York has retained its criminal jurisdiction over gambling activities after the enactment of the IGRA. Most pertinent to the issue are two provisions contained in 18 U.S.C. § 1166. The first, 18 U.S.C. § 1166(a), states:

> Subject to subsection (c) [licensed approved gambling], for purposes of Federal law, all State laws pertaining to the *licensing, regulation, or prohibition* of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country to the same extent as such laws apply elsewhere in the State.

18 U.S.C. § 1166(a) (emphasis added).

The question of jurisdiction under the IGRA is addressed in 18 U.S.C. § 1166(d), which states:

> The United States shall have *exclusive jurisdiction* over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country. . . .

18 U.S.C. § 1166(d) (emphasis added).

The language of the statute leaves open the question of which gambling laws are made applicable *under this section* to Indian country. The criminal statutes prohibiting gambling activity in the State of New York have been applicable to Indian country since 1948, when 25 U.S.C. § 232 was enacted, and thus were not "made applicable under this section" to Indian country.

Support for this interpretation is contained in the Senate Committee Report on the IGRA, which states:

> [I]t is the intention of the Committee that nothing in the provision of this section or in this act will supersede any specific restriction or *specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute*. . . .

1988 U.S.Code Cong. & Admin.News at 3082 (emphasis added). This statement would certainly apply to 25 U.S.C. § 232, the grant of criminal jurisdiction over Indian country to the State of New York. Thus, New York has retained its criminal jurisdiction over gambling offenses under the IGRA.

V. "Indian Country"

[12] Defendants have moved to dismiss the claims under 15 U.S.C. § 1175 on the basis that the St. Regis Reservation is not "Indian Country" for purposes of prosecutions under that statute. 15 U.S.C. § 1175 states:

> It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device . . . *within Indian country as defined in section 1151 of Title 18*. . . .

For purposes of the present prosecution, the elements of a violation of 15 U.S.C. § 1175 are (1) possession and use, (2) of a gambling device, (3) within Indian country. In response to the defendants' motion the government asserts that whether or not the St. Regis Reservation is Indian country is an issue of fact for the jury. It would appear, however, that the factual question for the jury is whether the incident took place *within* Indian country (i.e. within the boundaries of the St. Regis Reservation as opposed to say, downtown Syracuse) while the question of whether the St. Regis Reservation is itself Indian country as that term is defined in 18 U.S.C. § 1151 is a question of law to be determined by this

court. 18 U.S.C. § 1151, which defines the term "Indian country" states in applicable part:

> "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

This definition of Indian Country is extensive and, barring any unforeseen circumstances, clearly would encompass the portion of the St. Regis Reservation which is within the borders of the United States.

Defendants admitted at oral argument that the St. Regis reservation is within New York State and that the indictment alleges that gambling activity took place on the reservation. However, defendants assert that due to the "unique historical and legal character" of the St. Regis reservation it is not Indian country as that term is defined in 18 U.S.C. § 1151. Defendants' argument as to why the St. Regis reservation is not Indian country is puzzling. At times the defendants assert that the reservation is a Canadian Community or that certain portions of the reservation are within the Dominion of Canada. The defendants also make an argument which contradicts their theory that the reservation is under the jurisdiction of Canada. Though it is hard to follow from the defendants' memorandum of law, defendants apparently assert that a portion of the reservation, though by treaty located within the State of New York, is

somehow not within the jurisdiction of the United States. The defendants do not point out any treaty language which would support this rather unique proposition.[11]

The essential error in the defendants' argument is that the sovereignty retained, at this date, by Indian tribes has become almost completely subject to the authority of Congress. The Supreme Court has held that tribal sovereignty is subject to defeasance by federal statute. *See U.S. v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978); *Washington v. Confederated Tribes,* 447 U.S. 134, 152-53, 100 S.Ct. 2069, 2080-81, 65 L.Ed.2d 10 (1980). The Court has gone so far as to acknowledge that Congress, acting alone, may dissolve or modify treaties with Indian Nations. *See Lone Wolf v. Hitchcock,* 187 U.S. 553, 566, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903). Moreover, it is within the authority of Congress to enact laws of general application or which apply specifically to Indian lands without specifying which treaties with Indian Nations were effected by the new statute. *See Washington v. Yakima Indian Nation,* 439 U.S. 463, 478 n. 22, 99 S.Ct. 740, 750 n. 22, 58 L.Ed.2d 740 (1979). Given this framework it is clear, regardless of the history of any past treaty, that the Federal Government has the authority to place the St. Regis Reservation within the statutory definition of "Indian country" as set forth in 18 U.S.C. § 1151, and has done the same. Therefore, this court must deny defendants motion to

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[11]The portion of defendants memorandum of law which sets forth this argument reads as follows:

"Ultimately, a treaty was negotiated between the Seven Nations of Canada and New York State on May 31, 1796. This treaty established the present New York portion of the reserve of St. Regis within the boundaries of New York State and was ratified by the U.S. Senate.

Thus, the physical, geographical location of the place upon which the charges set forth in the indictments allegedly occurred are not now, nor have they ever been ceded to the United States for any purpose. Insofar as the charges set out in the indictment are concerned, *a fortiori,* the U.S. District Court has no jurisdiction over the alleged offenses."

dismiss the indictment with respect to charges under 15 U.S.C. § 1175; the St. Regis reservation is Indian country for purposes of that statute. However, an element of 15 U.S.C. § 1175, namely that the activity took place *within* the reservation, still must be proven by the government at trial.

VI. Grace Period Under IGRA

[13] The defendants also move for dismissal of the counts asserted pursuant to 15 U.S.C. § 1175 on the theory that the alleged activity is legal due to a provision of the recently enacted Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.* A complicated provision of the IGRA allows Indian tribes to obtain a one year grace period during which the operation of electronic games of chance, including slot machines, may continue while the tribes have the opportunity to negotiate tribal-state compacts concerning the continued operation of such devices. *See* 25 U.S.C. § 2703(7)(D). Notwithstanding defendants' claim that the St. Regis Tribe has requested the negotiation of a tribal-state compact, their argument fails. A necessary prerequisite for the application of 25 U.S.C. § 2703(7)(D)'s one year grace period is that the gambling activity "was *legally* operated on Indian lands on or before May 1, 1988." *Id.* As discussed above, commercial gambling for profit as alleged in the indictment was not a lawful activity within New York State on May 1, 1988. In fact, such activity is criminally prohibited under the public policy of New York. Therefore, defendants' motion in this respect must be denied; a necessary element for the application of the one year grace period is missing.

VII. Forcible Interference Under 18 U.S.C. § 111(a)(1)

[14] Defendant Anthony Laughing is charged with forcibly resisting or impeding officers of the New York State Police acting in cooperation with FBI agents in executing an arrest warrant, in violation of 18 U.S.C. §§ 111(a)(1) and 1114. The basis for the charge is that Laughing attempted to elude police officers in a high-speed chase before he was arrested.

Title 18 U.S.C. § 111(a)(1) states, in pertinent part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title [18 U.S.C. § 1114] while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Title 18 U.S.C. § 1114 prohibits killing or attempting to kill any of a long list of federal employees and officers. That list includes officers or employees of the Federal Bureau of Investigation.

The government stipulated during oral argument on the motions that Laughing is not charged with a violation of Section 1114, but that it was included in Count IX of the Laughing indictment because it is incorporated by reference in 18 U.S.C. § 111(a)(1) to identify officers covered by Section 111(a)(1).

Defendant contended that the activities carried out by state officers are not covered by Section 111(a)(1). However, a state officer acting in cooperation with, and under the control of, federal officers, is protected by the coverage of 18 U.S.C. § 111. *United States v. Williamson*, 482 F.2d 508 (5th Cir. 1973). The extent of the involvement of

federal officers with the state police in the present case, as well as whether force was used to resist or impede said officers, are questions of fact which are reserved for trial.

IT IS SO ORDERED.

Appendix C—Letter of U.S. Dept. of the Interior Field Solicitor Mariana R. Shulstad to U.S. Attorney James G. Arnold, dated January 9, 1989.

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
686 Federal Building, Fort Spelling
Twin Cities, Minnesota 55111

January 9, 1989

BIA.TC.2954

Hon. Jerome G. Arnold
United States Attorney
234 U.S. Court House
110 South Fourth Street
Minneapolis, Minnesota 55401

Re: Fond du Lac Lotto

Dear Mr. Arnold:

Following your meeting on January 4, 1989 with representatives of the Fond du Lac Reservation Business Committee and their attorneys, they met with Bureau of Indian Affairs officials and with me, provided us with copies of their recently enacted ordinance and with a December 30 letter to you, and discussed the Bureau position with respect thereto. After my review of the documents and advice to the Bureau, we have had further conversations with Band attorneys, and I have been asked by Bureau officials to provide you with a summary of my advice to them.

The crux of the inquiry here is whether the game of Lotto, as proposed by Fond du Lac, meets the requirements of Section 11(b)(1)(A) of the Indian Gaming Regulatory Act, Public Law 100-497, which permits Class II gaming if it "is located within a State that permits such gaming for any purpose by any person, organization or entity . . . ." If not, then the game would not fall within the exception at 18 U.S.C. §1166(c)(1) to the prohibition at §1166(a), and the possibility of federal prosecution for conduct of the game under §1166(d) would exist.

Minn. Stat. Ann. §609.76(1)(3)(1987) clearly prohibits the conduct of a lottery, and the statute has not yet been repealed following repeal of the constitutional prohibition upon which it is based, even though all indications seem to be that the repeal (or at least amendments authorizing but regulating lotteries) will be effected within the next several months. Under the line of cases beginning with *Bryan v. Itasca County*, 426 U.S. 373 (1976), and extending to *California v. Cabazon Band of Mission Indians*, 94 L.Ed.2d 244 (1987), if a particular activity is permitted at all, even though it may be heavily regulated and penalties imposed for violation of such regulations, the activity may be legally undertaken by Indians on an Indian reservation without the necessity of compliance with the regulations. The Gaming Act provision, at Section 11(b)(1)(A), is Congressional acceptance of that rule. The conduct of a lottery, however, would not appear to fall within the permitted-though-regulated category, commonly called civil-regulatory.

The definition of lottery appears at *Minn. Stat. Ann.* §609.75(1)(a) (1987), as follows:

> "A lottery is a plan which provides for the distribution of money, property or other reward or benefit to persons selected by chance from among participants some or all of whom have given a consideration for the chance of being selected."

Subdivision (2) of the same section defines bets, the receipt of which also constitutes a crime under §609.76(1), but subdivision (3) excepts from the definition of bets the following:

> "...
> (4) The game of bingo when conducted in compliance with sections 349.11 to 349.23.
> ...
> (6) [T]he conduct of a raffle under sections 349.11 to 349.22.
> (7) Pari-Mutuel betting on horse racing..."

What is curious about the state statutes is that bingo and raffles, even though authorized and regulated under Chapter 349, are not excepted from the definition of lottery, with the result that the conduct of bingo or raffles could conceivably be prosecuted under the lottery statute. See Op.Atty.Gen. 510-C-9 (1942), which held that bingo was a lottery if consideration was involved; Op.Atty.Gen. 510-A (1939), holding that a game similar to bingo was a lottery; Op.Atty.Gen. 129-122 (1926), holding that "beano" is a lottery (see *Penobscot Nation v. Stilphen*, 10 I.L.R. 5073 (Me.Sup.Ct., June 7, 1983), which holds that "beano" is bingo); Op.Atty.Gen. 510-A-1 (1938), Op.Atty.Gen., 510-A-1 (1952), and Op.Atty.Gen., 510-C-5 (1951), all holding that a prize drawing from the names of all purchasers of admission tickets was a lottery.

The opinions noted above were all rendered prior to enactment of the portions of *Minn. Stat. Ann.* Chapter 349 defining and regulating bingo, raffles, pull-tabs, etc., but the failure of the legislature to include specific exceptions for these games in the definition of lottery, except to the extent provided by *Minn. Stat. Ann.* §609.761 (1987), creates a curious anomaly. The definition of raffle, appearing

at *Minn. Stat. Ann.* §349.12(9) (1988) as "a game in which a participant buys a ticket for a chance at a prize with the winner determined by a random drawing to take place at a location and date printed upon the ticket," is even more puzzling, since it is virtually indistinguishable from the definition of lottery, and since §349.12(2) declares that bingo, raffles, paddlewheels, tipboards and pull-tabs are all lawful forms of gambling. Thus, whatever constitutes a raffle or bingo or, presumably, a combination thereof, is lawful and would by definition fall within Section 11(b)(1)(A) of the Gaming Act and thus within Class II gaming, and the result that it would be excepted from the prohibition contained in 18 U.S.C. §1166(a).

The game of Lotto which Fond du Lac proposes to license, as described at page 2 of Endreson's and Simon's December 30 opinion, appears to be a combination of bingo and raffle. The differences between bingo and Lotto are, first, that the tickets or cards are sold in advance of the game, and, second, that the row of numbers on the card or ticket totals six instead of five. The variations from the statutory definition of raffle seem non-existent, since I understand that both the location and date of the random drawing will appear on the Lotto tickets, which was the only factor which seemed initially at odds. Even the variations from bingo seem inconsequential.

Under the circumstances, it would seem that prosecution under the lottery statutes for conduct of the Lotto game proposed by Fond du Lac would run afoul of the axiom recently articulated in *United States v. Ferguson*, 776 F.2d 217, 223 (8th Cir. 1985), *cert. denied* 475 U.S. 1020 (1986), that

> "Penal statutes must define the criminal offense with sufficient clarity that ordinary people understand what conduct is prohibited. *Kolender v. Law-*

son, 461 U.S. 352 . . . (1983); *United States v. Harriss*, 347 U.S. 612 . . . (1954)."

See, also, *United States v. Articles of Drug*, 825 F.2d 1238 (8th Cir. 1987). Since the prohibitions of the lottery statute seem contradictory to or at least are confused by the definitions of bingo and raffles, as permitted activities, it would be very difficult to predict successful prosecutions of the proposed activity.

The Bureau of Indian Affairs has supported the Fond du Lac Band in many of its economic development endeavors and has expressed initial support for this endeavor as well, provided that it is not found to violate federal or state law. They appear comfortable with the conclusion of this analysis that the Lotto game proposed is consistent with the Indian Gaming Regulator Act and is not criminally prohibited under Minnesota Law.

Sincerely,

MARIANA R. SHULSTAD
Field Solicitor

cc: Mpls Area Director, BIA

Appendix D—Pertinent Text of Statutes Involved.

15 U.S.C. §1175

Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columoia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18.

18 U.S.C. §1151

Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. §1162

State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any

Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

18 U.S.C. §1166

Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include—

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

18 U.S.C. §1955(a).

Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

18 U.S.C. §3243.

Jurisdiction of State of Kansas over offenses committed by or against Indians on Indian reservations

Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

25 U.S.C. §232.

Jurisdiction of New York State over offenses committed on reservations within State

The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided,* That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

25 U.S.C. §2701.

Congressional findings

The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. §2703.

Definitions

For purposes of this chapter—

* * *

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation, and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only is such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 80 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

* * *

25 U.S.C. §2710.

Tribal gaming ordinances

(a) Exclusive jurisdiction of Class I gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

* * *

(b) Regulation of Class II gaming activity; net revenue allocation; audits; contracts

* * *

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

* * *

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

* * *

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

* * *

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Acceptance of Responsibility

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

New York General Municipal Law §187

Local option

Subject to the provisions of this article, and pursuant to the direction contained in subdivision two of section nine of article one of the constitution of the state, the legislature hereby gives and grants to every municipality the right, power and authority to authorize the conduct of games of chance by authorized organizations within the territorial limits of such municipality. . . .

New York General Municipal Law §188-a

Powers and duties of the board

The board shall have the power and it shall be its duty to:

1. Supervise the administration of the games of chance licensing law and to adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses thereunder and the conducting of games under

such licenses, which rules and regulations shall have the force and effect of law and shall be binding upon all municipalities issuing licenses and upon licenses of the board, to the end that such licenses shall be issued to qualified licensees only, and that said games shall be fairly and properly conducted for the purposes and in the manner of the said games of chance licensing law prescribed and to prevent the games of chance thereby authorized to be conduced from being conducted for commercial purposes or purposes other than those therein authorized, participated in by criminal or other undesirable elements and the funds derived from the games being diverted from the purposes authorized, and to provide uniformity in the administration of said law throughout the state, the board shall prescribe forms of application for licenses, licensees, amendment of licenses, reports of the conduct of games and other matters incident to the administration of such law.

* * *

8. Issue an identification number to an applicant authorized organization if it shall determine that the applicant satisfies the requirements of the games of chance licensing law and the rules and regulations of the board.

9. The board shall have the power to approve and establish a standard set of games of chance equipment and shall by its rules and regulations prescribe the manner in which such equipment is to be reproduced and distributed to licensed authorized organizations. The sale or distribution to a licensed authorized organization of any equipment other than that contained in the standard set of games of chance equipment shall constitute a violation of this section.

New York Penal Law §225.30

Possession of a gambling device

A person is guilty of possession of a gambling device when, with knowledge of the character thereof, he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:

1. A slot machine; or

2. Any other gambling device, believing that the same is to be used in the advancement of unlawful gambling activity.

3. A coin operated gambling device with intent to use such device in the advancement of unlawful gambling activity.

Possession of a gambling device is a class A misdemeanor.

New York Penal Law §225.32

Possession of a gambling device; defenses

1. In any prosecution for possession of a gambling device specified in subdivision one of section 225.30 of this chapter, it is an affirmative defense that: (a) the slot machine possessed by the defendant was neither used nor intended to be used in the operation or promotion of unlawful gambling activity or enterprise and that such a slot machine is an antique; for purposes of this section proof that a slot machine was manufactured prior to nineteen hundred forty-one shall be conclusive proof that such a machine is an antique; or (b) the slot machine possessed by the defendant was manufactured or assembled by the defendant for the sole purpose of transporting such slot machine in a sealed container to a jurisdiction outside this

state for purposes which are lawful in such outside jurisdiction.

2. Where a defendant raises an affirmative defense provided by subdivision one hereof, any slot machine seized from the defendant shall not be destroyed, or otherwise altered until a final court determination is rendered. In a final court determination rendered in favor of said defendant, such slot machine shall be returned, forthwith, to said defendant, notwithstanding any provisions of law to the contrary.

New York Tax Law §1604

Powers and duties of the division

a. In addition to the powers and duties provided in other sections of this article, the division shall have the power and it shall be its duty to operate and administer the lottery including any lottery for the support of winter sports physical education in commemoration of the XIII winter olympic games, and to promulgate rules and regulations governing the establishment and operation thereof, including but not limited to the following:

1. The type of lottery to be conducted.
2. The price or prices of a ticket or tickets in the lottery.
3. The numbers and sizes of the prizes on the winning tickets.
4. The manner of selecting the winning tickets.
5. The frequency of the drawings or selections of winning tickets.
6. Without limit as to number, the type or types of locations at which tickets may be sold.
7. The method to be used in selling tickets.
8. The use of vending machines or mechanical devices of any kind.

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